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ABSTRACT

The need to understand the basic law and to adopt clear policies applicable to sexual harassment is particularly important given the problem's sensitive nature and potential liability to school districts. This monograph is designed to assist school attorneys and administrators in understanding the law regarding sexual harassment of employees and students and to serve as a guide for preventative measure and policy development to reduce the incidence of sexual misconduct and respond appropriately to harassment claims. The first section provides an overview of the 1986 Supreme Court Decision "Meritor Savings Bank v. Vinson," followed by brief descriptions of 43 sexual harassment cases that can be used for further reference. Next, post-"Meritor" developments in sexual harassment laws are discussed. The third section outlines practical advice on handling sexual harassment in schools. Appendices A through F contain a copy of the "Meritor Savings Bank v. Vinson" decision, Equal Employment Opportunity Commission (EEOC) guidelines on sexual harassment, EEOC policy guidance for sexual harassment issues and sexual favoritism, the U.S. Department of Education's booklet on sexual harassment of students, and sample policies on sexual harassment of employees and students. (EJS)

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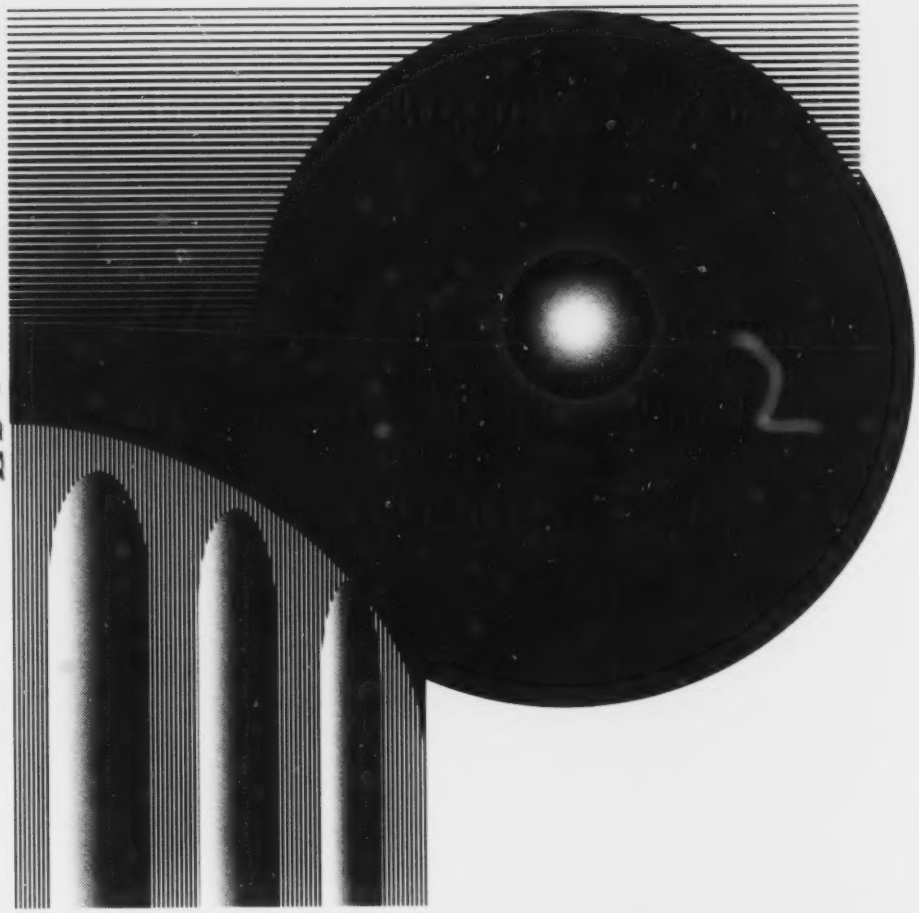

Sexual Harassment in the Schools: *Preventing and Defending Against Claims*

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An NSBA Council of School Attorneys Publication

Sexual Harassment in the Schools: Preventing and Defending Against Claims

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National School Boards Association
Alexandria, Virginia

Jim Walsh
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Austin, Texas

November 1990

About the NSBA Council of School Attorneys . . . .

Since 1967 the National School Boards Association's Council of School Attorneys has provided information and practical assistance to attorneys who represent public school districts. As the only national advocacy organization composed exclusively of attorneys representing school boards, NSBA's Council advises NSBA and its members on school law issues. It offers continuing legal education programs, produces specialized publications, and provides up-to-the-minute analysis of the issues. Council seminars are valuable forums for school attorneys to exchange ideas and information.

Nearly 3000 attorneys, representing local school districts of all sizes, find membership in NSBA's Council of School Attorneys essential for keeping abreast of school law issues and trends. Attorneys in thirty-two states receive these benefits through membership in their state school attorneys' councils which have affiliated with the NSBA Council of School Attorneys. States with affiliated councils include: Alabama, Arkansas, California, Colorado, Delaware, Florida, Georgia, Illinois, Iowa, Kansas, Maine, Michigan, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington, and West Virginia.

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SEXUAL HARASSMENT IN THE SCHOOLS: PREVENTING AND DEFENDING AGAINST CLAIMS, edited by Naomi Gittins, is a publication of the NSBA Council of School Attorneys. NSBA's Office of the General Counsel provides professional and executive staff support to the Council and its varied programming for school attorneys across the United States. For more information about the NSBA Council of School Attorneys, its publications, programs and membership, call 703/838-6722, or write NSBA, 1680 Duke Street, Alexandria, Virginia 22314.

FOREWORD

The NSBA Council of School Attorneys is pleased to present its newest monograph, **Sexual Harassment in the Schools: Preventing and Defending Against Claims.** This publication is intended to assist school attorneys and administrators in understanding the law regarding sexual harassment of employees and students and to serve as a guide in developing policies and preventive measures that effectively address the problem by reducing the incidence of sexual misconduct and by responding appropriately to harassment claims. The need to understand the basic law and to adopt clear policies applicable to sexual harassment is particularly important given the sensitive nature of the problem and the potential liability to school districts.

This publication provides an overview of the Supreme Court's 1986 decision in *Meritor Savings Bank v. Vinson,* a discussion of the post-*Meritor* sexual harassment cases and an outline of practical advice on handling sexual harassment in the schools. The appendices contain such useful materials as a copy of the *Meritor* decision, EEOC guidelines on sexual harassment, EEOC policy guidance on sexual harassment issues and sexual favoritism, the U.S. Department of Education's booklet on sexual harassment of students and sample policies on sexual harassment of employees and students. As a cautionary note, the reader should be aware that this publication does not intend to address fully the issues surrounding child abuse.

The Council offers this publication with the expectation that it will serve as a useful guide to attorneys and administrators seeking to prevent and respond to sexual harassment in the schools. The information presented is not intended to be legal advice, and the reader should consult legal counsel for advice on specific sexual harassment cases.

Finally, I wish to thank Naomi E. Gittins and Jim Walsh who contributed their time and expertise to writing this publication.

Donald B. Sweeney, Jr.
Chairman
NSBA Council of School Attorneys
November 1990

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THE LAW OF SEXUAL HARASSMENT AND *MERITOR SAVINGS BANK V. VINSON*

By: Jim Walsh
Hairston, Walsh, Anderson, Underwood & Schulze, P.C.
Austin, Texas

If it is true that the law changes as the values of society evolve, then perhaps no area of law is more volatile than the law concerning the relationships between the sexes. With the increase in divorce rates and the influx of women into previously male-dominated enclaves of the work force has come a revolution in society's views of the roles and responsibilities of both men and women. Not only have the laws pertaining to divorce, child custody and other family matters undergone change, the law has also begun to address the very sensitive problem of sexual harassment in the workplace.

This article will discuss the key issues and court decisions that have dealt with this problem. The discussion will focus first on Title VII litigation. State law causes of action will also be examined. Finally, the article explores the prospects for extension of the principles of sexual harassment to the teacher-student relationship—an area that should be of great concern to school trustees and administrators.

SEXUAL HARASSMENT AND TITLE VII

Sexual harassment is a form of discrimination based on sex. Title VII of the Civil Rights Act of 1964[1] makes such discrimination an unlawful employment practice:

> (a) It shall be an unlawful employment practice for an employer -
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

While the statute prohibits discrimination based on sex, the regulations adopted in 1980 specifically identify sexual harassment as an actionable form of discrimination under the statute. The regulations state:

> (a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when
>
> (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment,
>
> (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or
>
> (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[2]

Any discussion of the judicial interpretation of these standards must begin with the Supreme Court's 1986 decision in *Meritor Savings Bank, FSB v. Vinson*.[3] The case arose after Mechelle Vinson quit her job at the bank where she had worked for four years. Under the supervision of Sidney Taylor, Vinson began as a teller trainee and had received promotions up to the position of assistant branch manager. All parties agreed that Vinson's promotions had been based strictly on merit—a fact that later became key in the analysis of the courts.

According to Vinson, Taylor treated her kindly at first, but later suggested a sexual relationship. At first she refused, but then acquiesced for fear of losing her job. Vinson alleged that she had intercourse with Taylor 40-50 times in four years, that he fondled her in public, exposed himself to her, and even forcibly raped her on several occasions—all of which Taylor denied.

The district court ruled that Vinson had not been harassed.[4] Apparently focusing on the fact that Vinson's promotions had been based on merit, rather than the sexual relationship with her boss, the court ruled that Vinson had failed to establish a case of sexual harassment. Moreover, the court found that the relationship—if it existed at all—was one in which Vinson voluntarily participated.

The Court of Appeals for the District of Columbia Circuit reversed this decision.[5] The appeals court stated that a violation of Title VII may be predicated on either of two theories: harassment that involves the conditioning of concrete employment benefits on sexual favors; and harassment that creates a hostile or offensive working environment.[6] Furthermore, the court held that the "voluntariness" of the relationship was irrelevant.[7] Finally, in the court's view an employer is absolutely liable for sexual harassment practiced by supervisory personnel, whether or not the employer knew or should have known about the misconduct.[8]

When the case reached the Supreme Court, there were three key issues to resolve: (1) Can a plaintiff establish a sexual harassment case in the absence of a tangible economic loss? Is the creation and toleration of a hostile and offensive environment actionable under Title VII? (2) Can the complaining party willingly participate in a sexual relationship and still prevail in a sexual harassment suit? Does the voluntary participation of the complaining party provide a defense? (3) Under what circumstances is the employer liable for the acts of its employees?

The Supreme Court ruled squarely in favor of the hostile environment theory. Relying on the EEOC's regulations, the Court agreed with the court of appeals that there are two distinct types of sexual harassment suits. The first is a *"quid pro quo"* suit, in which the plaintiff establishes a tangible economic loss arising out of sexual harassment. In such cases the plaintiff is able to prove that she lost her job or was denied a promotion because of a refusal to submit to sexual harassment.[9] Since Vinson suffered no economic loss, she was unable to establish a *quid pro quo* case.

But the Court also recognized a second actionable form of sexual harassment—the "non-*quid pro quo*" or hostile environment case.[10] The Court noted that the regulations specifically define sexual harassment as:

> ...verbal or physical conduct of a sexual nature...when...such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

The Court held that the individual who has to work in such a "hostile environment" has been discriminated against on the basis of sex, just as much as the employee who loses a job because she refuses to have sex with her boss. Accordingly, the case was remanded to give the district court an opportunity to consider whether or not Vinson could prove a violation of Title VII under the hostile environment theory.[11]

As to the second issue, the Supreme Court opened the door to sexual harassment suits even when the woman participates willingly. The district court in the *Vinson* case did not resolve the conflicting testimony as to whether or not Vinson and Taylor ever had a sexual relationship. The court seemed to consider the issue irrelevant, inasmuch as it found that Vinson's participation was "voluntary." But the Supreme Court, again focusing on the regulations, found that the willing participation of both parties is not a defense:

> But the fact that sex-related conduct was "voluntary," in the sense that the com-

> plainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. The gravamen of any sexual harassment claim is that the alleged sexual advances were "unwelcome." 29 C.F.R. 1604.11(a) (1985).[12]

The Court recognized that this standard "presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact,"[13] but it directed lower courts to focus on "whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary."[14] Accordingly, the Court held that testimony concerning the complaining party's sexually provocative manner of speech and dress is "obviously relevant."[15] The Court noted that the regulations direct that sexual harassment must be assessed in light of "the record as a whole" and "'the totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.'"[16]

Finally, the Court declined to issue a definitive ruling on the issue of employer liability. The Court rejected the strict liability standard of the circuit court, and at the same time rejected the bank's position that the mere existence of a non-harassment policy and a grievance process insulated the employer from liability. Instead, the Court opined that Congress wanted courts to look to agency principles for guidance in this area.[17] Thus, the applicable standard will vary from state to state, depending on the law of that state with regard to employer liability for acts of employees.

In *Meritor*, the Supreme Court gave considerable deference to the Equal Employment Opportunity Commission's guidelines as a correct statement of the legal principles to be applied. The guidelines give the following examples of sexual harassment claims:

> If a female laborer complains to her foreman that the male workers on the job direct sexually suggestive remarks and gestures at her and the foreman tells her that such conduct is to be expected as part of the job, then her submission to the sexually harassing conduct is made an explicit term or condition of her employment.[18]

A connection between the conduct and the terms or conditions of employment can be inferred if:

> other women workers had complained to the employer, either directly or through an agent or supervisor, and had been told that if they did not like the conduct they could find another job.[19]

The EEOC guidelines further explain explicit *quid pro quo* harassment:

> If an employee's promotion depends on his or her granting sexual favors and the promotion is denied because the employee refuses to do so, then the employee is the victim of sexual harassment. The same result is reached if the employee does submit and consequently receives the promotion.[20]

In other words, sexual conduct in the above example is used as the "basis for employment decisions" affecting the employee. Moreover, the EEOC takes a broad view of the term "condition of employment," noting that, "whether it involves promotion, discharge, transfer, training, work assignment, salary, overtime, or getting an office with a window—the decision cannot have a sexual string attached."[21]

An example of a hostile environment theory is described in the guidelines:

> If certain male employees make sexual remarks, jokes, or gestures in the presence of or directed toward female employees, that conduct may make the work atmosphere intimidating or threatening for the female employees. The harassment of the female employees may also create an offensive work environment for other male employees.[22]

It is clear then that under Title VII sexual harassment cases come in two varieties—the *quid pro quo* case involving loss of economic benefits, and the hostile environment case. Moreover, the

key issue is whether or not the sexual advances, and sexually related conduct was "unwelcome," rather than whether or not the parties participated willingly. The courts have applied these standards in a great variety of fact situations. Attachment A following this article contains a listing of representative cases.

EMPLOYER LIABILITY

The one issue on which the Supreme Court declined to rule in the *Meritor* case is that of employer liability. Under what circumstances should the employer be held liable for the actions of its employees? The Supreme Court deferred to agency principles in the various states. In the absence of any clear direction in the *Meritor* case, examination of EEOC regulations and subsequent case law may provide some guidance.

The Code of Federal Regulations describes three sets of circumstances under which an employer might be held responsible for sexual harassment on the job. The employer's liability is defined in terms of the employment relationships involved.

First, in the case of agents or supervisory employees who engage in inappropriate sexual conduct, the regulations appear to impose strict liability:

> ...[A]n employer ... is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence.[23]

Second, with respect to sexual harassment by fellow employees, the regulations state that the employer is liable if it "knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action."[24]

Finally, the regulations make an employer liable for the acts of non-employees (e.g., school board members, outside contractors), if the employer "knows or should have known of the conduct and fails to take immediate and appropriate corrective action."[25]

In at least one pre-*Meritor* case, the Seventh Circuit imposed strict liability on an employer in a case where a plant supervisor used his authority to hire and fire to extort sex from female employees.[26]

In most instances, however, the circuit courts appear to apply a less strict standard. In cases where the employer responded promptly and appropriately to the situation, liability has generally not been imposed on the employer, even when the harassment is perpetrated by a supervisor. For example, in *Barnes v. Costle*,[27] the court held that an employer is generally liable for the discriminatory practices of its supervisors, but may be relieved of that liability if the supervisor acts without the employer's knowledge or the situation is rectified when discovered. In *Tomkins v. Public Service Electric & Gas Co.*,[28] the court held that an employer is liable for the actions of its supervisor only when prompt and appropriate remedial action is not taken after acquiring knowledge. In *Bundy v. Jackson*,[29] the court held that an employer can negate liability by taking immediate and appropriate corrective action. In *Jones v. Flagship International*,[30] the court established a test for making a hostile environment case that included the burden of proving that the employer knew or should have known of the harassment and failed to take prompt remedial action.

Attachment B following this article contains a list of representative cases on the issue of employer liability.

Both the regulations and the cases clearly show that prevention is "the best tool for elimination of sexual harassment." Employers should affirmatively raise the issue of harassment with employees. Appropriate education of employees regarding their rights under Title VII and sanctions against employers who violate the act provide the best defense against possible sexual harassment claims.[31]

SEXUAL HARASSMENT CLAIMS UNDER STATE TORT LAWS

Some victims of sexual harassment in the workplace choose to pursue state tort law claims rather than the Title VII cause of action. Relief under Title VII includes injunctions to restrain offensive practices, reinstatement and back pay, nominal damages, and attorneys' fees. Additional

remedies are available under common law tort theories of recovery.

State law tort actions for sexual harassment are usually brought as claims for assault and battery or for intentional infliction of emotional distress. As intentional torts, these theories of recovery allow exemplary as well as compensatory damages, and may otherwise broaden an employee's grounds for relief. The state law claim can expand on the Title VII cause of action, find liability under state anti-discrimination statutes, or look to general common law principles in defining the scope of employer liability.

For example, in *Eide v. Kelsey-Hayes Company,*[32] the Michigan Court of Appeals found that an employee could appear to consent to sexual conduct in the workplace while still finding the activity unwelcome, thus drawing on a Title VII principle. The court then looked to Michigan's own Elliott-Larsen Civil Rights Act to award damages unavailable under Title VII. The employee recovered $240,000 in compensatory damages and $32,000 in exemplary damages, and her husband won $28,000 for loss of consortium. A New York court similarly held an employee's spouse stated a claim for loss of consortium in a sexual harassment case.[33]

The Massachusetts Supreme Court broadened the scope of recovery for sexual harassment in two recent cases. In *College-Town, Division of Interco, Inc. v. Massachusetts Commission Against Discrimination,*[34] the court held a hostile environment cause of action cognizable under Massachusetts law, in violation of the state anti-discrimination statute. The Massachusetts court said that state courts might look to Title VII for interpretive guidance without being bound by the requirements of the federal cause of action. Thus, the employer could be held strictly liable with no requirement of notice. Damages for emotional distress were permitted, the employee was not required to mitigate damages, and an award of interest on back pay was held to be correct.

In *O'Connell v. Chasdi,*[35] an employee sued both a fellow employee and the employer for assault and battery and intentional infliction of emotional distress as well as for violation of her civil rights under Massachusetts law. Recognizing both the civil rights claim and the state common law tort claim, the court allowed the employee to advance both theories of recovery at the same time. With regard to the common law claims, the Massachusetts Supreme Court upheld the jury verdict for $100,000 in damages against the co-employee who committed the harassment. As for the civil rights claim against the employer, the appeals court remanded the case for fact finding.

Under particularly egregious circumstances, the Arizona Supreme Court held an employer independently liable for the sexual harassment of an employee by her supervisor. In *Ford v. Revlon, Inc.,*[36] the employee was allowed $100 compensatory and $1,000 punitive damages from her supervisor for assault and battery but no recovery for intentional infliction of emotional distress. The employer was held liable for $10,000 compensatory and $100,000 punitive damages for intentional infliction of emotional distress but not for assault and battery. The employer was further ordered to pay attorney's fees for the employee.

The basis for the employee's recovery was state tort law. Arizona law holds an employer liable for the acts of his agent which are extreme and outrageous. First, the employee had to demonstrate extreme and outrageous conduct. The court found that ignoring the employee's reports of her supervisor's threats and physical assaults over a thirteen month period satisfied the requirement. Next, either intent to cause emotional distress or reckless disregard that such distress would occur had to be demonstrated. The court found the employer's actual knowledge of the events and failure to conduct prompt investigation rose to the level of reckless or intentional disregard for the employee's welfare. Finally, the employee was required to show that severe emotional distress did occur. In this case, the employee became physically ill and attempted suicide during the period of harassment.

The Arizona Supreme Court held the employer independently liable not only for intentional infliction of mental distress but also for breach of contract. The court reasoned that the corporation disregarded its own policies and guidelines by failing to respond to the employee's sexual harassment complaints. The failure to respond breached a contract implied by the corporation's announced policies and procedures. This breach gave rise to the award of attorney's fees.

CONSTITUTIONAL CLAIMS

As public employers, school districts and school officials are additionally vulnerable to claims that sexual harassment violates protected constitutional rights of teachers or students. Claims have been advanced on the grounds of interference with fundamental due process rights, first amendment rights, or liberty rights. Because employees have a well defined right to freedom from sexual harassment under Title VII, school officials need to be most aware of possible constitutional violations vis-a-vis student claims of harassment.

The sensitive area of teacher/student relationships is particularly likely to breed cases raising sexual harassment issues. Two recent cases illustrate how such a case might arise.

In *Lopez v. Houston Independent School District,*[37] the Fifth Circuit held that a student has a constitutionally protected right to be free from the harm posed by anti-social activities while attending school. *Lopez* establishes a constitutional cause of action against a school district when its employee acted with callous disregard for a student's rights. The court points out that liability will not extend to the school district under 42 U.S.C. § 1983 based on its employer relationship to the tort-feasor or upon a *respondeat superior* theory. Liability extends to the district only for "deprivation of rights protected by the Constitution or federal laws that is inflicted pursuant to official policy."[38]

In the *Lopez* case, plaintiff alleged that a school bus driver failed to stop the bus and render aid when a student passenger was beaten unconscious in a fight. The Fifth Circuit concluded that the driver's failure to protect the student, if proven true, would support a § 1983 action against the driver if a jury found that such conduct "rose to the level of callous indifference and was a cause of injury."[39]

While *Lopez* does not directly bear on sexual harassment, it illustrates how the courts might impose a legal duty on public schools to protect students from the harm posed by inappropriate sexual conduct by school officials, or even by other students.

A Pennsylvania case, *Stoneking v. Bradford Area School District,*[40] is more directly on point. There, a federal district court held that a school district can be held liable to a student for the actions of an employee in a sexual harassment context. Again, the plaintiff alleged that she had fundamental liberty interest, entitling her to the protection of the district and its officials.

In *Stoneking*, a female student alleged sexual harassment perpetrated by the school band director and named the district, the principal, the assistant principal, and the superintendent as defendants. The court held that the student had a right under the Fourteenth Amendment and § 1983 to be protected from "state intrusions into the realm of personal privacy and bodily security."[41] The court further held that genuine issues of material fact as to the liability of the school district existed; the question of liability was for the jury. The court concluded that a jury could infer that the existence of a practice or custom caused the student's injuries. The court based the decision on reported past incidents of sexual misconduct between the school district's students and teachers, apparently viewing the past response to the situations as inadequate.[42] The Third Circuit affirmed.

The Supreme Court vacated the Third Circuit's decision and remanded the case for further consideration in light of its decision in *DeShaney v. Winnebago County Social Services.*[43] In *DeShaney* the Court ruled that the due process clause of the fourteenth amendment provides no constitutional right to be protected by the state from invasions of one's bodily integrity by private parties, but left open the question as to whether the state has a duty to protect those with whom it has a special relationship. On remand, the Third Circuit did not rule directly on the issue of whether there exists a special relationship between students and the school district that would give rise to a constitutional duty to protect students from bodily injury, but instead held that school officials could be held liable under two theories:

- the school officials were recklessly indifferent in allegedly failing to make clear to the band director that criminal assaults are impermissible, and

- the school district failed to train its employees to deal with allegations of child abuse.

When *Stoneking* again appeared in the Supreme Court, the High Court denied review, thus

leaving the Third Circuit's decision intact. However, the Supreme Court's refusal to hear the *Stoneking* case should not be construed as support for the proposition that students possess a substantive due process right to be protected from bodily injury. In a sexual harassment case where a student alleges a constitutional violation cognizable under § 1983, the school district should contend that state tort remedies can adequately redress the student's claims.

It should be noted that in the original *Stoneking* decision where the court entertained a constitutional claim to be free from bodily injury, two key factors appeared to determine whether or not liability will extend to school districts for the misconduct of their employees. First, courts will consider the frequency of the sexual conduct. As more incidents of harassment can be shown by the employee or student, the employer or school district is more likely to be held responsible. Second, the timeliness and effect of the school's response to complaints will be considered. The immediacy and appropriateness of an employer's action upon receiving reports of unlawful sexually-oriented behavior relate directly to employer liability. Charges that harassment is a policy or custom of the district or employer can be dispelled by a showing of affirmative action taken to eliminate sexual harassment from the school or workplace.

School officials must be further aware of constitutional claims raised in sexual harassment cases brought by public employees against their employers. In *Bohen v. City of East Chicago,*[44] for example, an employee claimed violation of equal protection rights under the Fourteenth Amendment. The court emphasized the importance of showing repeated incidents of harassment that evidence a "pattern or practice of discrimination."

TITLE IX OF THE EDUCATION AMENDMENTS OF 1972

Title IX of the Education Amendments of 1972 which prohibits sex discrimination in education, provides that "[n]o person in the United States, shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance."[45] Title IX clearly protects students, faculty and staff in educational institutions receiving federal funds from sex discrimination, including sexual harassment. Since the law under Title VII of the Civil Rights Act of 1964 has developed to a much greater extent than the law under Title IX, employees who are protected by both statutes are more likely to seek redress for sexual harassment under Title VII. However, students, who are not protected by Title VII, may bring suit under Title IX which the courts have interpreted by borrowing many of the principles developed under Title VII. Thus, courts have ruled that Title IX, like Title VII, prohibits both *quid pro quo* and hostile environment sexual harassment. *See, e.g., Lipsett v. University of Puerto Rico.*[46] In *Lipsett,* the court also found that the theories of employer liability applicable to Title VII cases apply to educational institutions for violations of Title IX.

CONCLUSION

The law pertaining to sexual harassment has developed rapidly, and will continue to do so. The notion that sexual harassment is an actionable form of discrimination in the workplace is not likely to change, however. Public employers are well advised to ensure that their key administrators are well versed in this area of the law, pro-active in enforcing the law, and swift to respond to signs of trouble.

END NOTES

1. 42 U.S.C. § 2000e-2.
2. 29 C.F.R. § 1604.11(a) (1987).
3. 477 U.S. 57 (1986).
4. 23 FEP Cases 37 (D.D.C. 1980).
5. 753 F.2d 141 (D.C. Cir. 1985).
6. *Id.* at 145.
7. *Id.* at 146.
8. *Id.* at 150.
9. *Vinson*, 477 U.S. at 64-65.
10. *Id.*
11. *Id.* at 68-69.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 69.
16. *Id.* (citing, 29 C.F.R. § 1604.11(b)).
17. *Id.* at 72.
18. EEOC Compliance Manual § 615:0006 (1982).
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. 29 C.F.R. § 1604.11(c) (1987).
24. 29 C.F.R. § 1604.11(d).
25. 29 C.F.R. § 1604.11(e).
26. *Horn v. Duke Homes, Div. of Windsor Mobile Homes,* 755 F.2d 599 (7th Cir. 1985).
27. 561 F.2d 983 (D.C. Cir. 1977).
28. 568 F.2d 1044 (3d Cir. 1977).
29. 641 F.2d 934 (D.C. Cir. 1981).
30. 793 F.2d 714 (5th Cir. 1986), *cert. denied,* 479 U.S. 1065 (1987).
31. 29 C.F.R. § 1604.11(f) (1987).
32. 154 Mich. App. 142, 397 N.W.2d 532 (1986), *aff'd in part, rev'd in part,* 431 Mich. 26, 427 N.W.2d 488 (1988).
33. *Spoon v. American Agriculturalist, Inc.*, 502 N.Y.S.2d 296, 120 A.D.2d 857 (1986).
34. 400 Mass. 156, 508 N.E.2d 587 (1987).
35. 400 Mass. 686, 511 N.E.2d 349 (1987).
36. 153 Ariz. 38, 734 P.2d 580 (1987).
37. 817 F.2d 351 (5th Cir. 1987).
38. *Id.* at 353 (quoting *Webster v. City of Houston,* 735 F.2d 838, 841 (5th Cir. 1984) (en banc)).
39. *Id.* at 356.
40. 667 F. Supp. 1088 (W.D. Pa. 1987), *aff'd,* 856 F.2d 594 (3d Cir. 1988), *judgment vacated,* 109 S. Ct. 1333 (1989), *on remand,* 881 F.2d 720 (3d Cir. 1989), *cert. denied,* 110 S. Ct. 840 (1990).
41. 667 F.Supp. at 1095.
42. *Id.* at 1102.
43. 109 S. Ct. 998 (1989).
44. 799 F.2d 1180 (7th Cir. 1986).
45. 20 U.S.C. § 1681.
46. 864 F.2d 881 (1st Cir. 1988).

ATTACHMENT A

PRE-*MERITOR* TITLE VII SEXUAL HARASSMENT CASES

Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977)

Government employee states a Title VII claim if her job was abolished because she repulsed her supervisor's sexual advances (but in the case of a bisexual supervisor, the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike).

Wright v. Methodist Youth Services, Inc., 511 F. Supp. 307 (N.D. Ill. 1981)

Discharge of a male employee because he rejected homosexual advances made by his supervisor violated Title VII.

E.E.O.C. v. Sage Realty Corp., 507 F. Supp. 599 (S.D.N.Y. 1981)

Lobby attendant discharged for refusing to wear a revealing bicentennial uniform was terminated in violation of Title VII.

Munford v. James T. Barnes & Co., 441 F. Supp. 459 (E.D. Mich. 1977)

Office assistant discharged for refusing her supervisor's advances.

Heelan v. Johns-Manville Corp., 451 F. Supp. 1382 (D. Colo. 1978)

Refusal to have sex with supervisor caused retaliatory termination.

Tomkins v. Public Service Electric & Gas Co., 568 F.2d 1044 (3d Cir. 1977)

Employee's continued employment and advancement violated Title VII if either knowingly or constructively dependent on acquiescence to supervisor's advances.

Fisher v. Flynn, 598 F.2d 663 (1st Cir. 1979)

Employee failed to state a claim for sexual harassment where she failed to allege that the department chairman had authority to terminate or recommend termination of her employment.

Cobb v. Dufresne-Henry, Inc., 603 F. Supp. 1048 (D. Vt. 1985)

Employee who was discharged after a dispute with her employer regarding whether or not she had used the term "sexual harassment" in complaining about a poster that advertised the company picnic did not state a Title VII claim where evidence indicated she had been fired for lying.

Harrison v. Reed Rubber Co., 603 F. Supp. 1457 (E.D. Mo. 1985)

Factory line worker was demoted after complaining of her superintendent's open and unwelcome affection for her.

Joyner v. AAA Cooper Transportation, 597 F. Supp. 537 (M.D. Ala. 1983), *aff'd,* 749 F.2d 732 (11th Cir. 1984)

Mechanic who rebuffed his manager's homosexual advances made off the job stated a Title VII case when he was later laid off after reporting the incident.

Horn v. Duke Homes, Div. of Windsor Mobile Homes, 755 F.2d 599 (7th Cir. 1985)

A plant employee who was demoted, then discharged, after refusing the repeated sexual advances of her male supervisor won Title VII case over unconvincing testimony that she was fired for unsatisfactory performance.

Burns v. Terre Haute Regional Hospital, 581 F. Supp. 1301 (S.D. Ind. 1983)

Testimony of employee's husband and two co-employees that an administrator had made suggestive comments to her did not support claim that the incident caused her termination a year later, especially since the decision to terminate was not within the administrator's exclusive authority.

Priest v. Rotary, 634 F. Supp. 571 (N.D. Cal. 1986)

Waitress established a Title VII claim by showing her employer's consensual sex partner got preferential job assignments, despite substandard performance, while employees who refused advances got less desirable job assignments.

King v. Palmer, 778 F.2d 878 (D.C. Cir. 1985)

Employee who established that a sexual relationship between her supervisor and another employee influenced that employee's promotion over her was not required to prove the sexual relationship had been consummated.

Marentette v. Michigan Host, Inc., 506 F. Supp. 909 (E.D. Mich. 1980)

Waitresses sought injunctive relief from enforcement of sexually provocative and discriminatory dress code under Title VII.

Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981)

Sexual harassment may amount to discrimination regardless of loss of tangible job benefits.

Katz v. Dole, 709 F.2d 251 (4th Cir. 1983)

Air traffic controller alleged that workplace was pervaded with verbal sexual slurs, insults, and innuendo.

Cummings v. Walsh Construction Co., 561 F. Supp. 872 (S.D. Ga. 1983)

Employee who rebuffed advances of supervisor and foreman was required to perform harsh and unpleasant tasks.

Moylan v. Maries County, 792 F.2d 746 (8th Cir. 1986)

Female dispatcher's claim that sheriff made numerous sexual advances and forced sex with her on one occasion stated a hostile environment claim.

Downes v. FAA, 775 F.2d 288 (Fed. Cir. 1985)

Five incidents of sexually offensive conduct in three years did not establish a pattern sufficient to constitute a pervasively hostile environment.

Loftin-Boggs v. City of Meridian, 633 F. Supp. 1323 (S.D. Miss. 1986), *aff'd,* 824 F.2d 971 (5th Cir. 1987), *cert. denied,* 108 S.Ct. 1021 (1988)

Female public works department chemist failed to make out a hostile environment claim where evidence showed she participated in crude, sexually-oriented jokes and banter.

Vermett v. Hough, 627 F. Supp. 587 (W.D. Mich. 1986)

Crude, physical clowning and horseplay among police troopers was childish but did not rise to the level of sexual harassment.

Robson v. Eva's Super Market, Inc., 538 F. Supp. 857 (N.D. Ohio 1982)

Evidence that a counter clerk was assigned more difficult tasks and otherwise penalized at work by her supervisor after refusing his advances established a Title VII cause of action.

Zabkowicz v. West Bend Co., 589 F. Supp. 780 (E.D. Wisc. 1984)

A female warehouse worker was subjected to verbal abuse, posted drawings bearing her initials of naked women or women engaged in sex acts and repeated exposures by her co-workers.

Rabidue v. Osceola Refining Co., 584 F. Supp. 419 (D. Mich. 1984), *aff'd,* 805 F.2d 611 (6th Cir. 1986), *cert. denied,* 107 S.Ct. 1983 (1987)

Judged by an objective standard, pictures of nude women and vulgar language in a refinery did not create a legally hostile and offensive work environment.

ATTACHMENT B

PRE-*MERITOR* EMPLOYER LIABILITY FOR SEXUAL HARASSMENT CASES

Munford v. James T. Barnes & Co., 441 F. Supp. 459 (E.D. Mich. 1977)

Employer may be liable for the acts of its agents and supervisory employees if it fails to investigate complaints of discrimination.

Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977)

Employer is generally liable for the discriminatory practices of supervisors under Title VII, but may be relieved of responsibility if the supervisor acts without the employer's knowledge or the situation is rectified when discovered.

E.E.O.C. v. Sage Realty Corp., 507 F. Supp. 599 (S.D.N.Y. 1981)

Building management corporation and its cleaning contractor held jointly liable for sex discrimination against contractor's employee.

Heelan v. Johns-Manville Corp., 451 F. Supp. 1382 (D. Colo. 1978)

Employer may be relieved of liability for harassment of a supervisor only where the employer has a policy of discouraging harassment, employee has failed to present the matter to a publicized grievance board, and the employer fails to rectify the situation.

Tomkins v. Public Service Electric & Gas Co., 568 F.2d 1044 (3d Cir. 1977)

Employer liable for the actions of a supervisor directly or vicariously, with actual or constructive knowledge, when prompt and appropriate remedial action is not taken after acquiring knowledge.

Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981)

An employer is responsible for the discriminatory acts of its agents or supervisors regardless of whether the employer knew or should have known of the acts, but may negate liability by taking immediate and appropriate corrective action.

Howard University v. Best, 484 A.2d 958 (D.C. App. 1984), *appeal after remand,* 547 A.2d 144 (D.C. App. 1988)

A university is liable to a professor for sexual harassment by a dean because he had a critical role in personnel affairs and made the final decision not to renew the professor's contract.

Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979)

Employee was not required to first seek redress through bank's personnel department in order for company to be held liable under Title VII.

Katz v. Dole, 709 F.2d 251 (4th Cir. 1983)

Employer was or should have been aware of harassment because of pervasive character and because of employee's specific complaints to her supervisors; policy against harassment was ineffective.

Cummings v. Walsh Construction Co., 561 F. Supp. 872 (S.D. Ga. 1983)

Sexual harassment was so widespread that company had constructive knowledge of it; top level management personnel were involved in the activity; therefore, company was liable for the activity even though company policy was violated.

Harrison v. Reed Rubber Co., 603 F. Supp. 1457 (E.D. Mo. 1985)

Instructions to plant supervisor to stay away from an employee, without directions to cease sexual harassment and without monitoring by the employer, were not enough to preclude employer liability.

Robson v. Eva's Super Market, Inc., 538 F. Supp. 857 (N.D. Ohio 1980)

Supervisor who responded to an employee's complaints of harassment by telling her to ignore the incidents was clearly liable for the harassing activity.

Horn v. Duke Homes, Div. of Windsor Mobile Homes, 755 F.2d 599 (7th Cir. 1985)

Corporation held strictly liable under doctrine of *respondeat superior* where plant supervisor used his authority to hire and fire to extort sex from female employees in exchange for keeping their jobs.

Toscano v. Nimmo, 570 F. Supp. 1197 (D. Del. 1983)

When a hospital employee complained that a supervisor's choice for a promotion decision was based on sex, the hospital administrator was liable because he did not pay attention to the complaint, no remedial action was taken for a year, and the supervisor's eventual transfer included a promotion.

Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307 (5th Cir. 1987)

Employer was sufficiently prompt in responding to employee's sexual harassment claims so as not to be liable to employee under Title VII.

Scott v. Sears, Roebuck and Co., 605 F. Supp. 1047 (N.D. Ill. 1985), *aff'd*,798 F.2d 210 (7th Cir. 1986)

Except for an isolated touch and an isolated vulgar comment, a female mechanic's allegations of suggestive language and behavior directed at her by other employees did not extend liability to her employer for sexual harassment. Employee could not attribute employer with either actual or constructive knowledge.

Zabkowicz v. West Bend Company, 589 F. Supp. 780 (E.D. Wisc. 1984)

Despite employee's repeated complaints and physical evidence of harassment, management did not conduct an investigation or discipline an employee for nearly four years. Reciting rules against harassment at occasional meetings was ineffective response.

Barrett v. Omaha National Bank, 584 F. Supp. 22 (D. Neb. 1983), *aff'd,* 726 F.2d 424 (8th Cir. 1984)

Because of bank's remedial response to a female employee's complaint of her male co-worker's inappropriate behavior on a business trip, the claim against the bank failed. The bank launched an investigation within four days. The perpetrator was placed on 90-day probation, warned that future misconduct would result in termination, and was passed by for pay raises for 15 months. A letter reporting the incident was placed in his personnel file. For failing to intervene, another male employee was reprimanded, passed over at least three times for promotions and denied raises for 18 months. A letter was placed in his file.

DEVELOPMENTS IN CASE LAW SINCE *MERITOR SAVINGS BANK V. VINSON*

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Since the Supreme Court's decision in *Meritor Savings Bank v. Vinson,*[1] courts have decided numerous cases involving sexual harassment. Most of the cases involve allegations of hostile environment rather than *quid pro quo* sexual harassment since the latter often present such egregious factual situations that the employer frequently resolves the situation before it reaches a court. The case law tends to focus on whether the plaintiff has established sexual harassment under the criteria set forth in *Meritor* and if so, whether the employer should be held liable. Following the Supreme Court's advice on the liability issue, the courts have applied agency principles in making their determinations. Broadly stated, the courts have ruled in favor of employers when they took prompt, appropriate remedial action once they learned about incidents of sexual harassment committed by supervisors or coworkers and against those employers who failed to respond adequately to complaints. In some instances the courts did not address the liability issue but instead resolved the case on the grounds that the evidence was insufficient to establish a violation of Title VII or was not credible.

Below are short summaries of sexual harassment decisions issued by federal courts of appeals since *Meritor.* They are categorized according to the prevailing party and by circuit. Emphasis is placed on the facts in each case in order to provide examples of the types of behavior which may be considered by courts to constitute sexual harassment.

DECISIONS FOR THE PLAINTIFF

Fourth Circuit

Paroline v. Unisys Corp.[2]

In *Paroline*, the Fourth Circuit Court of Appeals reversed the district court's grant of summary judgment for the employer and the defendant supervisor in a case in which the plaintiff alleged sexual harassment and constructive discharge in violation of Title VII.

Paroline was hired as a word processor at Unisys in the fall of 1986. During her job interview, Moore, the defendant supervisor, asked her what she would do if subjected to sexual harassment in the workplace. Soon after Paroline started work, Moore began to make sexually suggestive remarks to her that she considered offensive. On one occasion, Moore approached Paroline and started rubbing his hands on her back. In January 1987, Paroline accepted a ride home with Moore during a severe snowstorm. During the car ride, he made what she interpreted to be sexually suggestive remarks, kissed her and repeatedly tried to hold her hand. When they reached the plaintiff's apartment, Moore insisted on coming in despite her objections. In the apartment, Moore grabbed Paroline and began kissing her and rubbing his hands up and down her back, ignoring her demands that he stop. At first he refused to remove his hands, but then she eventually persuaded him to leave.

When Paroline informed the head of the office of the incident, he told her that he knew of

previous complaints about sexual harassment in the office and promised that it would not happen again. Unisys launched a formal investigation of Moore's conduct after which Moore was disciplined. The company issued a written warning to Moore that any recurrences of his behavior or any retaliatory conduct would be grounds for immediate termination. He was instructed to seek counseling and to limit contact with female employees to official company business. Unisys also terminated his access to the company's intelligence facility. Unisys notified the plaintiff of the actions taken against Moore at the end of January, but she considered them inadequate since she had learned of Moore's alleged harassment of other female workers at Unisys and the failure of the company's previous warnings to deter him. Although there is no evidence that Moore made any further inappropriate remarks or sexual overtures toward Paroline after she complained, Paroline resigned two weeks later.

In reversing the district court's grant of summary judgment for the supervisor, the court found that Paroline had produced enough evidence to raise a genuine issue of material fact as to whether Moore exercised sufficient supervisory authority over her to qualify as an employer under Title VII. Paroline could pursue her claim against Moore himself only if he was considered her employer. The court held that an individual qualifies as an "'employer' under Title VII if he or she serves in a supervisory position and exercises significant control over the plaintiff's hiring, firing or conditions of employment."[3] The supervisory employee need not have ultimate authority to hire or fire as long as he has significant input into such personnel decisions. Even if the employee is not the plaintiff's formally designated supervisor, as long as the company's management approves or acquiesces in the employee's exercise of supervisory control over the plaintiff, that employee will hold "employer" status for Title VII purposes. The court noted that the power to determine work assignments often represents a key element of supervisory authority.

Citing *Swentek v. USAir, Inc.*,[4] the court held that to prove a hostile environment claim, the plaintiff must show

- that the conduct in question was unwelcome,
- that the harassment was based on sex,
- that the harassment was sufficiently pervasive or severe to create an abusive working environment, and
- that some basis existed for imputing liability to the employer.

The Fourth Circuit in *Paroline* adopted a dual standard to determine whether the harassment was sufficiently severe or pervasive; the plaintiff must first demonstrate that the harassment interfered with her ability to perform her work or significantly affected her psychological well-being; and second, that the harassment would interfere with the work performance or significantly affect the psychological well-being of a reasonable person in the plaintiff's position. The appeals court found that Paroline had raised genuine issues of material fact on both the subjective and the objective inquiries. With regard to how the circumstances would have affected a reasonable person, the court noted that the supervisor's transgression were "far from trivial" and that a reasonable person might find them "traumatic."[5] The court pointed out that a reasonable person's fear could also have been heightened by the knowledge that the supervisor had harassed other women and had ignored the company's warnings to stop and because of the superior position that the supervisor held in the company.

On the question of the company's liability for Moore's activities, the Fourth Circuit noted that in a hostile environment claim, an employer is liable for one employee's sexual harassment of another worker if the employer had "actual or constructive knowledge of the existence of a sexually hostile working environment and took no prompt and adequate remedial action."[6] The court also accepted plaintiff's theory that Title VII liability can be imputed to the employer on the ground that where it has notice of the harasser's prior conduct toward other female employees, the employer should know of the likelihood of the individual harassing other female workers, and therefore, it has a duty to take adequate steps to try to prevent future harassment. With regard to the first basis of liability, the court said that the adequacy of Unisys' remedy is a question of fact which the court may not dispose of at the summary judgment level if reasonable minds could differ as to whether the remedial action was "reasonably calculated to end the harassment."[7] The court

noted that although there was evidence that Unisys had disciplined Moore and warned him that future misconduct would result in his discharge, there was also evidence that prior warnings by the company had failed to deter Moore from continuing to harass female employees and that the head of the office had openly joked about the complaints of sexual harassment after ostensibly having warned male employees not to engage in harassment of women.

As to the other ground for imputing liability to the employer, the Fourth Circuit held that:

> an employer who anticipated or reasonably should have anticipated that the plaintiff would become a victim of sexual harassment in the workplace and yet failed to take action reasonably calculated to *prevent* such harassment may be held liable under Title VII. An employer's knowledge that a male worker has previously harassed female employees other than the plaintiff will often prove highly relevant in deciding whether the employer should have anticipated that the plaintiff too would become a victim of the male employee's harass in conduct.[8]

However, the court cautioned that knowledge of such previous incidents does not necessarily indicate that the employer should anticipate who will be the next victim of harassment. For example, the court noted if the male employee had previously targeted only women under a certain age or in a certain job classification, it might be unreasonable to expect an employer to anticipate the harassment of a plaintiff who falls outside those categories.

Fifth Circuit

Wyerick v. Bayou Steel Corp[9]

In *Wyerick*, the plaintiff, a female crane operator brought a sexual harassment action against her former employer under Louisiana state law. The court noted that the Louisiana courts have determined that the state statute is similar in scope to Title VII, and they look to the criteria under the federal statute to determine whether a plaintiff has asserted a cause of action for sexual discrimination.

Wyerick, the crane operator, claimed that she was subjected to a hostile working environment when she became the target of numerous sexual comments by coworkers and supervisors after she complained about the quality of emergency care she had received when she had experienced chest pain and shortness of breath while working one night. Her treatment had included an examination by a male emergency medical technician and an EKG during which it was necessary for her to remove her blouse. The comments began in July 1987 and persisted until the time of this action. The plaintiff made four reports to company management about the sexual comments. The company acknowledged that it was aware of the comments and that immediate action would be taken to halt them. The company monitored the radio for sexually harassing comments and asked the plaintiff to report any future comments made to her by male employees. But there was no evidence in the record that the employees who made the remarks were contacted by Bayou Steel or that Bayou Steel took any affirmative steps to remedy the situation.

At Bayou Steel, work terminology often had sexual connotations such as "stick it in," and employees often joked with each other, sometimes using sexual nuances. The plaintiff claimed that she usually did not reply to sexual or dirty jokes; however, she did make a few arguably sexual replies, telling one individual that he had never had a good woman and did not know what one would be and calling someone a "mother fucker" after she was referred to as a "bitch." The plaintiff's lawsuit related only to the comments, jokes and gestures related to the EKG and other physical examinations and not to any general sexual discussions at work.

The Fifth Circuit reversed the district court's grant of summary judgment to the employer on several grounds. The appeals court ruled that the district court erred in finding that the sexual conduct was as offensive to men as it was to women workers and therefore, the conduct was not based on sex. The appeals court pointed out that the conduct complained of consisted of highly personalized lewd statements and gestures regarding the plaintiff's breasts and a physical examination that she underwent and, therefore, by its nature could not be said to be as equally offensive to men and women. The Fifth Circuit also held that summary judgment should not have

been granted since the question of welcomeness should have been committed to the trier of fact in this case; the district court had found that the plaintiff's occasional replies to sexual remarks indicated that she did not view the comments as unwelcome. The district court also held that the plaintiff was barred as a matter of law from maintaining a claim for hostile environment because her work atmosphere as a whole was heavily charged with sexual comments and gestures. The appeals court said that such environments are at the core of the hostile environment theory and in a footnote stated that entering into such an environment should not be an indication that the victim welcomed abuse. [10]

Sixth Circuit

Yates v. Avco [11]

In *Yates v. Avco*, two secretaries charged that their supervisor, who was a 28-year employee of the company, had sexually harassed them by creating a hostile working environment. The supervisor's harassment included such acts as closing the door whenever one of the plaintiffs entered his office, discussion of personal matters with them, numerous invitations for drinks or meals, inviting himself to one of the plaintiff's home, comments on the plaintiffs' appearance, lewd references to parts of plaintiffs' bodies, dirty jokes, frequent sexually suggestive comments, mentioning sleeping together, telling one plaintiff that she was on his "mistress" list and calling one of the plaintiffs into his office in order to watch her walk out at which time he would make groaning sounds.

When the plaintiffs complained about the supervisor's conduct, their employer asked that they not file a complaint with the EEOC. While the employer did conduct an investigation that ultimately found that the supervisor had harassed the plaintiffs for which he was demoted with a salary cut, the company also refused to give the secretaries copies of tapes that contained statements they had made in connection with the company's investigation, declined to give the complainants written assurance of job protection and refused to correct plaintiffs' personnel files to explain their long absences during the course of the investigation. During the investigation the employer had allowed the accused supervisor to take administrative leave but forced the two secretaries to use their sick leave.

The Sixth Circuit found that there was no question that the supervisor had harassed the two secretaries and that the sexual advances were unwelcome and focused instead on the question of whether the company should be held responsible for the supervisor's acts. The court cited the Supreme Court decision in *Meritor Savings Bank v. Vinson* [12] which held that an employer cannot be held strictly liable for harassment by a supervisor and that agency principles should be applied. The Sixth Circuit found in this case that the employer should be held liable given that its sexual harassment policy was vague and ineffective. The policy provided that an employee should report harassment to the immediate supervisor who then would be responsible for reporting and correcting the harassment. However, the policy failed to provide an alternative for those instances where the supervisor is the harasser.

In addition, the court noted that there was evidence that the supervisor accused in this case had a history of harassing other female employees but that no action was ever taken against him. The court found that it was not clear that the employer had actual notice of the supervisor's behavior prior to the complaints but held that it had constructive knowledge and therefore should be held liable. The court finally stated that a forbidden act may still be deemed to have been committed within the scope of employment when the act occurs at the office, during working hours and is carried out by a person with authority to hire, fire and discipline. The court also implied that any sexual harassment is foreseeable; otherwise, employers would not have policies against it.

Seventh Circuit

Bohen v. City of East Chicago [13]

In *Bohen* a Hispanic female fire department dispatcher brought suit under 42 U.S.C. § 1983, alleging violation of her equal protection rights based on the harassment to which she was subjected by her immediate supervisor and other fire fighters. The plaintiff's supervisor, a senior dispatcher, committed such acts as touching plaintiff's crotch, talking to her constantly about sex, includ-

ing his preferred positions, plaintiff's participation, and his expectations for her behavior, rubbing his pelvis against plaintiff's buttocks, touching her with his leg while she was sitting, and forcing her to leave the bathroom door open. The other fire fighters harassed plaintiff by making obscene comments, describing sexual fantasies of which plaintiff was the object, constantly inviting plaintiff to engage in deviate sexual conduct and implying plaintiff was a lesbian because she did not respond to them. Her captain told her that being forcibly raped in the bushes would improve her disposition.

When plaintiff complained, no action was taken. The fire department did not have a written policy against sexual harassment even though fire officials knew of the sexually oppressive working conditions. There was evidence that the department considered the abusive environment to be the problem of the female employees.

In ruling in plaintiff's favor, the court held that sexual harassment by a state employer constitutes sex discrimination in violation of the equal protection clause and is actionable under § 1983. Creating abusive conditions for female employees but not for male employees is discriminatory and the type of conduct prohibited by the equal protection clause. The court cautioned, however, that every passing overture by a male public official to a female employee is not a denial of equal protection, nor is a single, innocent romantic solicitation which inadvertently causes offense to the recipient.

To prove an equal protection violation, the plaintiff must show intentional discrimination. A single discriminatory act against one individual can amount to intentional discrimination for equal protection purposes. The plaintiff need not prove a discriminatory policy against an entire class; discrimination against plaintiff because of her membership in the class is sufficient. However, evidence of a pattern or practice of discrimination is strong evidence supporting plaintiff's claim that she has been the victim of discrimination.

The ultimate inquiry to determine an equal protection violation is whether the sexual harassment constitutes intentional discrimination. This differs from the Title VII inquiry as to whether or not the harassment altered the conditions of the victim's employment. A plaintiff can make a showing that the harassment attributable to the employer under § 1983 amounted to intentional discrimination or that the conscious failure of the employer to protect the plaintiff from the abusive conditions created by fellow employees amounted to intentional discrimination.

The employer can raise a defense by showing that the harassment was directed at plaintiff because of factors personal to her and not because she is a woman. However, it is unlikely that an employer could defeat a claim of sexual harassment by showing that the harassment was justified or that it had a legitimate business purpose. The court said no scenario is imaginable where harassment is a necessary business practice or is substantially related to important governmental objectives.

The court held that the city is liable even for informal actions if they reflect a general policy, custom or pattern of official conduct which even tacitly encourages conduct depriving citizens of their constitutionally protected rights. The plaintiff has an actionable claim against the city where management officials knew in general of a pattern of sexual harassment in the fire department, complaints of sexual harassment were addressed superficially, if at all, and where the department had no policy against sexual harassment.

This case was remanded for a determination of damages.

Gilardi v. Schroeder[14]

In *Gilardi*, the court ruled that the owner of a trucking company discriminated against a female office clerk on the basis of sex in violation of Title VII when he drugged and raped her at his home and then fired her at the insistence of his wife. There was also evidence that he often boasted that he would have sex with any woman, used a note pad with a sexual drawing to instruct female employees, talked about sexual intercourse and group sex with female employees, patted female employees on the buttocks and asked them if they wore bras. He repeatedly brought up sexual topics with plaintiff, made comments about her breasts, patted plaintiff on the buttocks and put his hand between her thighs. In a social setting on one occasion he insisted on playing strip poker during which everyone disrobed except him.

The court found the defendant in violation of Title VII since his sexual advances were not only unwelcome, but he also had sex with plaintiff without her voluntary consent. The court also

upheld damage awards for plaintiff's state law claims of battery and intentional infliction of emotional distress.

Volk v. Coler[15]

In *Volk*, the plaintiff, a child abuse outreach worker, alleged that she was sexually harassed by her immediate supervisor. The harassment consisted of such acts as persistent social invitations to plaintiff after work, overtly offensive and sexual touching, explicit sexual gestures, calling plaintiff such names as "honey" and "babe," several sexually offensive advances and questioning plaintiff about personal issues during a promotion interview. When plaintiff rebuffed her supervisor's suggestions and advances, he treated her abruptly and ignored his responsibilities with respect to her cases. He also complained that plaintiff and a female coworker spent too much time together and suggested that they were "queer." Plaintiff was also denied a promotion in favor of a male candidate who scored lower on a written test and had less experience than plaintiff.

Plaintiff also alleged that the supervisor's harassment extended to three other female employees who were subjected to offensive touching and sexual gestures and were called inappropriate names. The supervisor also made numerous degrading remarks about other female employees.

After plaintiff filed a grievance, the labor relations administrator concluded that the supervisor's actions were improper, and if true, would be hard to defend. However, the grievance was ultimately denied. After plaintiff was transferred against her wishes to another office, she filed a second grievance that also failed.

In her suit plaintiff asserted violations of her rights under the equal protection clause and under Title VII of the Civil Rights Act of 1964. The court held that the equal protection clause prohibits the employer from creating working conditions abusive toward women and not toward men and that liability for sexual harassment amounting to sex discrimination under the equal protection clause has been found where a female employee was subjected to "repeated crude sexual advances and suggestive comments" despite her explicit rejection and to sexual assault at work and harassment by other employees acting to protect the abuser.[16] Under the equal protection clause, the plaintiff need not prove that all women were discriminated against; it is enough to show that plaintiff alone was harassed because of her sex. However, any evidence of a pattern or practice of discrimination is strong support for a plaintiff's claim that she herself has been a victim of discrimination.

Brooms v. Regal Tube Co.[17]

In *Brooms*, the plaintiff, a black female industrial nurse, sued her employer, its parent company and her supervisor for subjecting her to racial and sexual harassment. With regard to her Title VII sexual harassment claim, Brooms alleged that during her sixteen months of employment, her supervisor made numerous explicit sexual remarks. Although she protested or attempted to ignore his advances and sexual commentary, he persisted.

After Brooms wrote a letter to the company's vice president and to the parent company's vice president of human resources, an independent investigator was hired who determined that Brooms had been straightforward and honest about the incidents. The vice president then made the supervisor apologize to Brooms, postponed his merit salary increase and warned him that he would be fired if the conduct occurred again.

After this meeting, the supervisor informed the plaintiff that he was not afraid of the vice president and after several weeks resumed his offensive comments. His conduct also included showing Brooms a pornographic photograph depicting an interracial act of sodomy and told her that the photo showed the "talent" of a black woman and that she had been hired for the purpose indicated in the photo. Brooms then filed a charge of discrimination with the state department of human rights and the EEOC. A few months later, the supervisor again showed Brooms another racist pornographic picture involving bestiality and told her that the picture showed how she "was going to end up." As she tried to grab the picture, her supervisor grabbed her arm and threatened to kill her if she moved. She threw coffee on him and ran away, screaming and falling down a flight of stairs as she fled. She did not return to work after this incident but remained on the company's payroll for two months.

In upholding the district court's ruling for plaintiff on her Title VII sexual harassment claim, the appeals court followed the standard set forth

in *Meritor Savings Bank v. Vinson*, that a plaintiff must demonstrate that she has experienced "[u]nwelcome sexual advances, requests for sexual favor, and other verbal or physical conduct of a sexual nature which was sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment."[18] In *Scott v. Sears, Roebuck & Co.*,[19] the Seventh Circuit said the district court must consider whether "the demeaning conduct and sexual stereotyping cause[d] such anxiety and debilitation to the plaintiff that working conditions were 'poisoned' within the meaning of Title VII." In evaluating a sexual harassment claim, the court must use an objective and a subjective standard; it must consider:

> the likely effect of a defendant's conduct upon a reasonable person's ability to perform his or her work and upon his or her well-being, as well as the actual effect upon the particular plaintiff bringing the claim. Only if the court concludes that the conduct would adversely affect the work performance and the well-being of both a reasonable person and the particular plaintiff bringing the action may it find that the defendant has violated the plaintiff's rights under Title VII.[20]

In determining the company's liability for the supervisor's actions, the court of appeals did not address the district court's grounds that the supervisor was a "manager" of the company and his acts were the acts of the corporation, but instead upheld the lower court's other basis for liability that the company knew of the problem but failed to take appropriate action. The court declared,

> An employer's response to alleged instances of employee harassment must be reasonably calculated to prevent further harassment under the particular facts and circumstances of the case at the time the allegations are made. . . . [A] court should not focus solely upon whether the remedial activity ultimately succeeded, but instead should determine whether the employer's total response was reasonable under the circumstances as then existed.[21]

Although the plaintiff did not allege constructive discharge in connection with her Title VII claim, the appeals court nevertheless approved the lower court's finding that Brooms had in fact proved that she had been constructively discharged and therefore was entitled to back pay. In determining constructive discharge, the court must focus upon the impact of the alleged conduct upon a reasonable person.

Eighth Circuit

Hall v. Gus Construction Co.[22]

Hall involved a claim under Title VII brought by three female traffic flaggers who alleged that they were subjected to a sexually hostile environment at the road construction site where they worked. The harassment committed by some of the male crew members included such things as referring to the women as "fucking flag girls," calling one of the flaggers "herpes" and writing offensive names such as "Cavern Cunt" and "Blond Bitch" on the plaintiffs' cars. The male crew members also repeatedly asked in a crude manner that the plaintiffs engage in sexual intercourse and oral sex. The men also physically harassed the plaintiffs by rubbing the women's thighs and grabbing their breasts. Some of the crew members exposed their buttocks or genitals to the plaintiffs and flashed obscene pictures at them. Someone also urinated in one of the plaintiff's water bottle and gas tank. The mechanic refused to fix plaintiffs' pilot truck when it leaked carbon monoxide fumes. Plaintiffs were denied use of a vehicle to make trips to town for bathroom breaks, thus forcing them to relieve themselves in a ditch in view of the male crew members.

When the plaintiffs complained to the job foreman, he talked to the crew members, but the harassment soon resumed. The foreman also observed some of the incidents but did nothing.

The court recognized that plaintiffs may establish sexual harassment in violation of Title VII by showing that sexual conduct has the purpose or effect of unreasonably interfering with work performance or creating an intimidating, hostile or offensive working environment. However, the predicate acts underlying a sexual harassment claim need not be clearly sexual in nature; a court

may correctly consider incidents of harassment and unequal treatment that would not have occurred but for the fact that the plaintiffs are women.

On the issue of employer liability, the court held that an employer may be held liable for the conduct of a plaintiff's fellow workers, if management knew or in the exercise of reasonable care should have known about a barrage of offensive conduct and did nothing about it. In this case, the job foreman as an agent of the company had both actual and constructive notice of the harassment. The plaintiffs had complained to him individually and as a group, and he also observed some of the incidents. Even if he did not know everything that occurred, the court found that the incidents were so numerous that the foreman and the company were liable for failing to discover it and to take remedial steps to end it.

Jones v. Wesco Investments, Inc.[23]

In *Jones*, the plaintiff, a receptionist who was promoted to the position of office manager, alleged that her employer, the president of the company, sexually harassed her in violation of Title VII. The president made repeated sexual advances toward her, requested sexual favors and engaged in verbal and physical conduct of a sexual nature with her. His conduct included such acts as rubbing his hands up and down the sides of her body, touching her breasts, pinching her, patting her on the bottom, kissing the top of her head, once putting his hand up her dress on the outside of her thigh, telling plaintiff that one day her breasts would be his, telling plaintiff to spend more time in the kitchen because he could see her nipples better in cool temperature, asking plaintiff to accompany him to unoccupied apartment buildings ostensibly for advice on decorating the apartments, putting his arm around plaintiff and once kissing her on the lips.

The court affirmed the district court's judgment in favor of plaintiff, finding that the president's conduct constituted sexual harassment in violation of Title VII.

Ninth Circuit

E.E.O.C. v. Hacienda Hotel[24]

The EEOC brought this employment discrimination action on behalf of several Hispanic maids employed by Hacienda Hotel. The suit charged Hacienda with sexual harassment, terminations based on pregnancy, failure to accommodate religious beliefs and retaliation for opposing discriminatory practices. With respect to the sexual harassment claim, the EEOC alleged that the Hacienda had created a hostile working environment by the conduct of the chief of engineering and the executive housekeeper who was female. The chief of engineering made numerous crude and disparaging remarks regarding the pregnancy of three of the maids and subjected them to sexually offensive remarks in the presence of the executive housekeeper who merely laughed. The head housekeeper also made disparaging remarks about the pregnancies of several of the maids and called them names such as "dog" or "whore" or "slut." The engineering chief also threatened one of the maids that he would have her fired if she did not submit to his sexual advances. He regularly offered another maid money and an apartment, if she would "give him [her] body" and assured her that she would never be fired if she had sex with him. At least one of the maids complained to the hotel's general manager and her union representative about the sexually offensive comments, but the situation did not improve. Each of the maids eventually filed a complaint with the EEOC.

The court of appeals upheld the district court's determination that the harassment was sufficiently severe and pervasive so as to alter the terms and conditions of the claimants' employment and to create a sexually hostile work environment. As to employer liability, the court ruled that employers may be held liable for failing to remedy or prevent a hostile or offensive work environment known to management level employees or that in the exercise of reasonable care, should have known. Here, the general manager of the hotel had actual knowledge of allegations of harassment, as did the executive housekeeper who had authority to hire, discharge, and discipline employees in the housekeeping department. The appeals court also upheld the district court's finding that appellants should have known of the harassment because it was severe and pervasive and seriously tainted the complainants' work environment. The employer also failed to take prompt remedial action when notified of its employees' allegations.

The court rejected the employer's argument that the complainants' failure to pursue internal remedies insulate the employer from liability, pointing out that the Supreme Court had disposed of that defense in *Meritor.* The court stated:

> Where as here, the employer's discrimination policy does not specifically proscribe sexual harassment, and its internal procedures require initial resort to a supervisor who is accused of engaging in or condoning the harassment of which the employee complains, it would be plainly unreasonable to require discrimination claimants to exhaust such procedures as a predicate to Title VII suit.[25]

Eleventh Circuit

***Sparks v. Pilot Freight Carriers, Inc.*[26]**

In *Sparks,* the plaintiff, a billing clerk and general secretary, alleged that her supervisor, the terminal manager, created a sexually hostile working environment in violation of Title VII, that she had been discharged on the basis of sex and as a result of *quid pro quo* harassment. The supervisor had engaged in such behavior as rubbing plaintiff's shoulders, touching and smelling her hair, making repeated sexual remarks to her, making repeated inquiries about the plaintiff's personal life, (was she married, did she have a boyfriend, could she get pregnant), making threatening remarks to plaintiff ("you better be nice to me", "your fate is in my hands," and "revenge is the name of the game") and making at least one remark the district court characterized as "too sexually explicit" to repeat. After plaintiff called in sick and did not report to work, she was fired the next day while a male employee who also did not report to work the same day because of illness was not discharged.

There was no evidence that the plaintiff had notified any superior about the harassment, but there was also no evidence that the employer had a policy against sexual harassment or an effective grievance procedure.

The appeals court reversed the trial court's grant of summary judgment to the defendant. The Eleventh Circuit held that the trial court had erroneously applied the *respondeat superior* doctrine to determine the employer's liability. The appeals court stated that *respondeat superior* does not apply where the supervisor is the employer's agent, in which case the employer is directly liable. Although under agency principles, a master is generally only liable for torts committed by his servant within the scope of employment, there are exceptions, such as when the servant is aided in accomplishing the tort by existence of the agency relationship. Even though the servant is acting entirely for his own benefit, the master is liable.

The EEOC has determined that a supervisor is an agent of the employer for Title VII purposes, if the supervisor exercises authority actually delegated to him by his employer by making or threatening to make decisions affecting the employment status of a subordinate. This usually applies in a *quid pro quo* case, but the court applied it here, since the evidence showed that the supervisor used his delegated authority to assist him in harassing the plaintiff. Therefore, a genuine issue of fact existed as to whether the supervisor was the employer's agent and whether the employer was liable to the plaintiff. (The court does not address the issue where the claim is exclusively one of hostile environment and the supervisor does not threaten or use his authority against the victim.)

The court also found that the harassment was sufficiently persistent and severe to satisfy the *Meritor* requirement that the conduct must seriously affect the plaintiff's psychological well-being.

DECISIONS FOR THE EMPLOYER

Fourth Circuit

***Swentek v. USAir, Inc.*[27]**

In *Swentek,* the plaintiff, a 16-year flight attendant, alleged that she was sexually harassed by a 20-year pilot (not plaintiff's supervisor). She claimed that the pilot made obscene comments, embarrassed her in front of an FAA official with a nonsexual prank, disparaged her age and weight, jumped in front of her at a hotel to "check out" the legs of a registration clerk, exposed himself to her, reached under plaintiff's skirt and grabbed plaintiff's genitals, threatened to delay plaintiff's

pay by withholding her name from the flight log book, dropped to his knees and sniffed her when they were first introduced, made taunting remarks about plaintiff's off duty attire, attempted to block plaintiff's way through doors at the airport and made obscene phone calls to her. She also alleged that another pilot grabbed her breasts and told her it was a greeting from the first pilot. The defendant denied all these acts and presented evidence that plaintiff was vindictive, that she threatened lawsuits against coworkers for real or imagined slights, that she used foul language, frequently talked about sex, placed a sexual object in her supervisor's mailbox, urinated in a cup and passed it to someone as a drink, grabbed the genitals of another pilot and invited him to have sex. Plaintiff denied all of these acts.

When the plaintiff complained, her employer investigated the allegations and issued a letter of reprimand to the pilot and informed him that he would be suspended if another complaint was made against him. The employer claimed that it notified plaintiff of this action, but the plaintiff denied receiving any notice that the pilot had been disciplined. When the plaintiff filed an EEOC claim, an attorney at USAir investigated the charges and determined that they lacked merit, because the pilot had ceased using foul language and no new complaints had been made.

In reviewing the conflicting evidence, the court found only that the pilot had used foul language and had sung lewd limericks in front of plaintiff.

The Fourth Circuit ruled that the employer was not liable on the plaintiff's hostile environment claim since the pilot was not plaintiff's supervisor and, therefore, the employer would be liable only if it had actual or constructive knowledge of the hostile working environment and did nothing to remedy the situation. Here the employer's actions in investigating and reprimanding the pilot were a sufficient response.

The appeals court did note that the district court erred in finding that the plaintiff's past use of foul language or sexual innuendo in a consensual setting indicated that she would not be offended by the pilot's conduct and comments. The dress and conversation of a plaintiff are relevant when the victim works with the harasser on a daily basis, but where the harasser has no knowledge of the plaintiff's past conduct, it is improper for a court to find that the prior conduct meant she welcomed the harassing behavior.

Dwyer v. Smith[28]

In *Dwyer,* a female police officer alleged that other male police officers created a sexually hostile work environment by subjecting her to innuendo, disparagement, humiliation and insinuation. She claimed that she received pornographic materials through the department's mail system and that she was accused of having sex with other officers. The plaintiff also charged that she was present during graphic conversations about victims of sex crimes, that women were referred to in degrading terms, that other employees drove by her home to see if she had male visitors and that on one occasion she was exposed to graphic descriptions of sexual behavior.

Other officers who testified presented a vastly different account of what took place on the job and indicated that plaintiff often engaged in "dirty talk" or used profanity. Other evidence showed that while plaintiff had previously received above average evaluations, her record was marred by several incidents of misconduct that impugned her veracity which lead to her dismissal.

Based on the sharply contrasting testimony, the court found that only one pornographic mailing of undetermined origin occurred and that there was only occasional inappropriate language or references to sex. The court also pointed out that plaintiff had made very few complaints and gave no testimony about the alleged incidents prior to the suit, and for several years while she was on the police force, she had made no complaints at all. Based on its factual findings, the court ruled that the plaintiff had failed to prove sexual harassment that altered the conditions of her employment and created an abusive working environment.

The court also affirmed the district court's finding that plaintiff had not been subjected to retaliatory discharge. The court pointed out that a public law enforcement agency has a duty and obligation to discharge an employee who causes an adverse effect on employee morale and day-to-day functioning of the staff. The plaintiff failed to prove that her discharge would not have occurred but for her filing of an EEOC charge. The court held that no Title VII violation has occurred

if retaliation is only part of the reason for an employee's discharge.

Fifth Circuit

Jones v. Flagship International[29]

In *Jones,* decided very shortly after *Meritor,* the plaintiff alleged that she was subjected to both *quid pro quo* and hostile environment sexual harassment. The plaintiff, an attorney hired as an EEO manager, claimed that her supervisor, the vice president of personnel harassed her by inviting her to go to a hotel with him because she needed the "comfort of a man," propositioning her on several business trips, and making numerous other advances. She also complained about the use of bare breasted mermaid sculptures as table decorations at an office party and alleged discrimination in pay and promotion.

At first plaintiff's grievances were ignored, but when she filed a complaint with the EEOC, she was suspended with pay the next day. Plaintiff was terminated when the employer learned that she had solicited two other female employees to file charges and had taken material from her supervisor's personnel file home.

The court ruled that plaintiff had not been subjected to hostile environment harassment. Although plaintiff need not show tangible job detriment or adverse employment effect to establish a *prima facie* case of sexual harassment under Title VII, the absence of such detriment requires a commensurately higher showing that the sexually harassing conduct was pervasive and destructive of the working environment. Here, plaintiff did not show that the conduct complained of was sufficiently pervasive to constitute a hostile working environment.

The court held that plaintiff also failed to establish *quid pro quo* sexual harassment, because she failed to show tangible job detriment, i.e., dismissal was not retaliatory, and failed to demonstrate that she was required to accept sexual harassment as a condition of receipt of a job benefit.

The court also noted that incidents of sexual harassment reported by other female employees bear on plaintiff's claim only if there is evidence that the incidents affected plaintiff's psychological well-being.

Dornhecker v. Malibu Grand Prix Corp.[30]

In *Dornhecker,* the plaintiff, a corporate staff employee, resigned after four days on the job because of alleged sexual harassment by a marketing consultant to the company. Claiming a violation of Title VII for hostile environment harassment, the plaintiff asserted that on a business trip, the consultant had put his hands on her hips, had dropped his pants in front of her at the airport, touched her breasts and put his feet on a table in front of her and then "playfully" choked her when she complained. When plaintiff became hysterical after the choking incident, her immediate supervisor agreed to speak with the company president about the behavior of the consultant. The president assured the plaintiff that she would not have to work with the consultant after the current trip which was to last one and a half more days. The plaintiff resigned the same day after she received this assurance. The harasser in fact did not attend the rest of the business meetings on that trip, and his contract was not renewed.

The court assumed without deciding that the plaintiff had been a victim of sexual harassment, but found in favor of the employer because it responded promptly to the plaintiff's complaint of harassment. The court noted that the offending conduct had spanned only two days and had not been aggressive or coercive. The employee had not been propositioned or threatened. The court believed that the company's action was decisive given that it had heard only one side of the story.

The court also ruled that the plaintiff had not been constructively discharged. The issue in constructive discharge cases is whether a reasonable person in plaintiff's position would have felt compelled to resign. An employee's obligation to be reasonable includes not assuming the worst and not jumping to conclusions too fast. The plaintiff did not give the company a fair opportunity to demonstrate that it could curb the harasser's behavior.

Bennett v. Corroon & Black Corp.[31]

In *Bennett,* cartoons depicting plaintiff engaged in crude and deviant sexual activities were posted in the men's room. When plaintiff learned of the presence of the cartoons, she left work and did not return. The chief executive officer of the

company had seen the cartoons but did nothing to have them removed until the next day when he learned of plaintiff's reaction to them. The company removed the CEO in part because of this incident. It also assured the plaintiff of its good opinion of her and requested on numerous occasions that she return to work. Plaintiff also received her full salary until she found new employment.

The court affirmed the ruling of the district court in this case but only because the plaintiff could only receive equitable relief which she had already obtained from her employer and could not recover damages for mental anguish. Title VII relief includes only equitable relief that would restore a plaintiff to the fruits and status of her employment as if there had been no discrimination. Where the employer changed management and continued to pay plaintiff, no other equitable relief would be appropriate.

The court specifically noted, however, that the district court's finding that the employer had responded promptly to correct the situation was wrong in view of the fact that the CEO had seen the cartoons and allowed them to remain posted. The company's removal of the CEO and its assurances to plaintiff do not absolve them of liability.

The court also noted that there was insufficient evidence to determine whether the incident represented an isolated occurrence which did not rise to the pervasive severity required to constitute a violation of Title VII.

Sixth Circuit

Highlander v. KFC National Management Co.[32]

In *Highlander,* the plaintiff, an assistant manager in a restaurant, alleged that the district training manager and her immediate supervisor sexually harassed her. The plaintiff claimed that the training manager made comments about her uniform, touched her legs and buttocks, and touched her name tag which was pinned over her breast. She charged that her immediate supervisor put his arm around her and suggested that she go with him to a motel if she wanted a promotion. Plaintiff was subsequently dismissed. After plaintiff complained, the company conducted an investigation which led to the demotion of the training manager but which revealed insufficient evidence to discipline the plaintiff's immediate supervisor.

The court found in favor of the employer with respect to plaintiff's claims of *quid pro quo* and hostile environment harassment. With respect to *quid pro quo* harassment, the court said that the employee bears the burden of proving that submission to the unwelcome sexual advances of supervisory personnel was an express or implied condition of receiving job benefits or that tangible job detriment would result from the employee's failure to submit to the sexual demands of supervisory employees. The court noted that in cases of *quid pro quo* harassment, the employer is strictly liable for the conduct of supervisory employees having plenary authority over hiring, advancement, dismissal and discipline. In this case, the court found no *quid pro quo* harassment since it believed that the supervisor's suggestion to go to the motel was induced by the plaintiff's request that they meet in a bar to discuss her opportunities for promotion. The court also pointed to evidence that the plaintiff and her husband had indicated that they did not place any serious implications upon the supervisor's conduct, and that there was no indication that the plaintiff was denied a job benefit or suffered detriment as a result of her refusal to engage in the activities suggested by the supervisor. The supervisor did not participate in the decision to terminate plaintiff. She was dismissed for poor performance and absenteeism.

The court also rejected plaintiff's hostile environment claim. Applying the analysis from *Rabidue,*[33] the court found that plaintiff had failed to demonstrate that she was offended by alleged incidents or that her performance or psychological well-being was affected by them.

Rabidue v. Osceola Refining Co.[34]

In *Rabidue,* the plaintiff, an executive secretary, alleged that the supervisor of the company's key punch and computer section made obscene comments about women generally and about plaintiff in particular. The company knew of the supervisor's crude and vulgar comments but had not been successful in curbing his behavior. This supervisor had no authority over plaintiff. The plaintiff also complained that other employees displayed pictures of nude or scantily clad women

in their offices and in the work area. Plaintiff was characterized as capable, independent, ambitious, intractable and opinionated. Co-employees saw her as abrasive, rude, antagonistic, extremely willful, uncooperative and irascible. She constantly argued with coworkers and with the company's customers. She disregarded supervisory instruction and company policy if they conflicted with her personal conclusions. Despite this aggressive personality, there was no evidence that the plaintiff ever complained to a higher authority about the offensive comments and pictures.

Ruling in favor of the employer, the court declared that in order to prevail in a Title VII offensive work environment sexual harassment action, a plaintiff must prove:

- that she is a member of a protected class;
- that she was subject to unwelcome sexual harassment in the form of sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature;
- the harassment was based on her sex;
- the harassment unreasonably interfered with her work performance and created an intimidating, hostile or offensive working environment that affected seriously the psychological well-being of the plaintiff; and
- the existence of *respondeat superior* liability.

Plaintiff must demonstrate that she would not have been the object of harassment but for her sex. Sexual conduct that proves equally offensive to male and female workers would not support a Title VII sexual harassment charge because both men and women were accorded like treatment. The plaintiff has the burden to prove that injury resulted not from a single or isolated offensive comment, incident or conduct, but from conduct, incidents or comments that occurred with some frequency. The trier of fact when judging the totality of the circumstances must adopt the perspective of a reasonable person's reaction to similar environment under essentially like or similar circumstances. In addition to proving interference with work performance and serious effect on psychological well-being, plaintiff must also show she was actually offended by the defendant's conduct and that she suffered some degree of injury as a result of the abusive or hostile work environment.

Proper assessment of hostile work environment claims would include consideration of the nature of the alleged harassment, the background and experience of the plaintiff, her coworkers and supervisors, the totality of the physical environment of plaintiff's work area, the lexicon of obscenity that pervaded the environment both before and after the plaintiff's introduction into the environs, and the reasonable expectations of the plaintiff upon voluntarily entering that environment.

Plaintiff must also prove *respondeat superior* liability by proving that the employer through its agents or supervisory personnel knew or should have known of the charged sexual harassment and failed to implement prompt and appropriate corrective action. The promptness and adequacy of the employer's response to correct instances of alleged sexual harassment is of significance in assessing a sexually hostile environment claim and the employer's reactions must be evaluated upon a case by case basis.

The court held that one employee's vulgar language coupled with sexually oriented posters did not result in a hostile or offensive working environment. This case involved no sexual propositions, offensive touchings or sexual conduct of a similar nature that was systematically directed to plaintiff over a protracted period of time.

Seventh Circuit

***Scott v. Sears Roebuck*[35]**

In *Scott*, a case decided a few months after the Supreme Court's decision in *Meritor*, the plaintiff, a female auto mechanic, brought a hostile environment claim alleging that a senior auto mechanic and other mechanics sexually harassed her. The harassment included making repeated propositions to plaintiff (invitations to go out for drinks), winking at her, offering to give plaintiff a rubdown, the senior mechanic asking plaintiff

what he would get for helping her when she requested assistance, slapping plaintiff on the buttocks and one mechanic telling plaintiff that he knew that she moaned and groaned while having sex. Plaintiff never complained to any supervisory personnel about this conduct before bringing suit.

The court ruled that even if all plaintiff's allegations were true, they fall short of what is necessary to maintain a hostile environment claim under Title VII. The court held that the plaintiff must allege instances of harassment sufficiently severe or pervasive so as to alter the conditions of the victim's employment and create an abusive working environment. The conduct and sexual stereotyping must cause such anxiety and debilitation to the plaintiff so that her working conditions are "poisoned." The court found that the conduct of the other mechanics was too isolated and lacking in repetitive and debilitating effect to sustain a hostile environment claim. There also was no evidence that the senior mechanic retaliated for plaintiff's refusal to entertain his advances; he gave her a favorable performance review.

The court also found that plaintiff was not wrongfully discharged, but rather that her termination was due to low productivity and lack of business at the auto shop.

Swanson v. Elmhurst Chrysler-Plymouth [36]

In *Swanson,* the plaintiff, an assistant to the finance manager of a car dealership, claimed that she was discharged for refusing to submit to sexual harassment. She claimed that the general manager subjected her to sexually suggestive remarks, humiliating comments in front of other people and physical contact. Some of the other employees testified that the work atmosphere was relaxed and friendly and dismissed the manager's conduct as harmless teasing. The general manager claimed that plaintiff was discharged for excessive absences.

The court of appeals upheld the district court's ruling that the plaintiff had been subjected to sexual harassment but that her discharge was for reasons unrelated to any sex discrimination. However, the Seventh Circuit rejected the lower court's award of nominal damages of $1 and attorney's fees to plaintiff. The court held instead that only equitable relief is available under Title VII and that any award of damages is necessarily legal relief. But the plaintiff, although she had been subjected to sexual harassment could not receive equitable relief given that her discharge was unrelated to the harassment and, in these cicumstances, the employer is deemed to prevail. Therefore, the award of attorney's fees was also reversed by the court.

Eighth Circuit

Moylan v. Maries County [37]

In this case, a female ambulance dispatcher, alleged that the county sheriff created a hostile working environment by making numerous unsolicited sexual advances (attempting to put his arms around her, kiss her and fondle her) and on one occasion by raping her. After an investigation, the county prosecutor determined that no criminal charges should be filed against the sheriff. The defendant presented evidence that the plaintiff often flirted with other officers and hugged and kissed them. The plaintiff also had pled guilty to falsifying her employment application to obtain CETA benefits.

While the court ruled that a sexually hostile environment can constitute a violation of Title VII, it held that plaintiff had failed to make out a case. She had proved that she was a member of a protected class and that the harassment was based on her sex, but did not prove that the harassment was unwelcome since there was evidence that she had invited it. The court also believed that the alleged harassment did not impact on plaintiff's employment since plaintiff worked regular shifts for ten days after the alleged rape, and she produced no testimony that she was distressed or unable to perform her duties.

Ninth Circuit

Jordan v. Clark [38]

In *Jordan,* the plaintiff, an administrative assistant at the U.S. Fish and Wildlife Service alleged that her immediate supervisor engaged in *quid pro quo* and hostile environment sexual harassment in violation of Title VII. The plaintiff charged that her supervisor made harassing phone calls to her at home, improperly touched her, made sexist comments and requested that she sleep with him in order to get a promotion. However, the court did

not credit her allegations, finding that there was insufficient evidence of the harassing phone calls and that the touching did not occur or was insignificant. The court based this finding on plaintiff's failure to mention this conduct throughout lengthy administrative hearings. The court also noted that many people at the office made off-color jokes and that the supervisor had flirted with the plaintiff, rather than making a sexual advance.

When the plaintiff complained about the alleged harassment, the Service conducted an investigation and found that no discrimination had occurred, but that the supervisor had retaliated against the plaintiff for filing a complaint. Plaintiff appealed these findings through administrative hearings, but ultimately no discrimination was found.

Finding in favor of the employer, the court ruled that the plaintiff had not been subjected to a hostile working environment within the meaning of *Meritor.* Since the court discredited plaintiff's allegations of unwelcome sexual advances, requests for sexual favors and other sexual conduct, it held that the harassment was not sufficiently pervasive to alter the terms of plaintiff's employment and did not create an abusive environment.

The court also held that plaintiff had not been subjected to retaliation for engaging in an activity protected by Title VII. Alleged resistance to a supervisor's advances is protected activity only if the advances occurred and were unlawful. The court said that the alleged adverse actions, such as increasing the plaintiff's duties, denying requests to attend management courses, removal of her higher level duties, poor performance appraisals, setting unreasonable performance standards, diverting work to other employees and assigning plaintiff to a clerical job, did not have an adverse impact on plaintiff, were not taken in retaliation for protected activity and did not create an abusive environment leading to constructive discharge. The court viewed the case not as one of retaliation, but a problem of conflicting personalities.

Tenth Circuit

Hicks v. Gates Rubber Co. [39]

In *Hicks,* the plaintiff, a black female security guard alleged that she was the victim of racial and sexual harassment. The plaintiff claimed that supervisors and other security guards subjected her to harassment in the form of racial slurs and jokes, referring to blacks as "niggers," "coons," and "lazy niggers;" calling plaintiff "buffalo butt;" disparate treatment such as making her jump off a loading dock; not permitting her to sit while inspecting the plant; not allowing her to take lunch at the usual time and making her ride in a car on a wet passenger seat. Plaintiff alleged that a supervisor rubbed her thigh, touched her on the buttocks and on one occasion, grabbed her breasts and got on top of her. She claimed that other security guards were hostile toward her and that she was not warned of a broken step on which she fell and injured herself. Plaintiff did not report these incidents to her employer but did file a complaint with the EEOC.

The employer claimed that plaintiff's work performance was deficient, that she accidently dropped her gun and challenged another employee to a fight.

The Tenth Circuit found that the trial court had correctly ruled that no racial harassment or *quid pro quo* sexual harassment occurred, but remanded the case to the district court for consideration of the hostile environment claim. In so ruling, the court stated that the predicate acts underlying a sexual harassment claim do not have to be clearly sexual in nature; any harassment or other treatment of an employee or group of employees that would not have occurred but for the sex of the employee may, if sufficiently patterned or pervasive, comprise an illegal condition of employment under Title VII. Incidents of sexual harassment that are directed at an employee other than the plaintiff can be used as proof of plaintiff's hostile work environment claim. No evidence of sexual harassment directed specifically at plaintiff is necessary for a claim under Title VII. "Even a woman who was never herself the object of harassment might have a Title VII claim if she were forced to work in an atmosphere where such harassment was pervasive."[40] In determining the pervasiveness of harassment against the plaintiff, a trial court may aggregate evidence of racial hostility with evidence of sexual hostility.

Ebert v. Lamar Trucking Plaza [41]

Reviewing the district court's finding under a "clearly erroneous" standard, the Tenth Circuit acknowledged that Title VII does cover harass-

ment based on sex which creates an offensive and abusive working environment, but pointed out that under the Supreme Court's ruling in *Meritor* the harassment must still be "sufficiently severe or pervasive 'to alter the conditions of the [victim's] employment and create an abusive working environment.'"[42] However, where the harassment consisted of the use of rough language which was used by supervisors and employees alike, both male and female, and occasional unwelcome touching, the conduct did not rise to the level of a Title VII violation. The appeals court also noted that the lower court had found that the management of the truck stop took prompt appropriate corrective action when it received complaints.

Eleventh Circuit

Steele v. Offshore Shipbuilding, Inc. [43]

In *Steele,* the plaintiffs, an executive secretary and an emergency medical technician, charged their employer with violation of Title VII through creation of a sexually hostile working environment. They alleged that one the employer's vice presidents, who acted as general manager, harassed them by making sexually oriented jokes, requesting sexual favors from the plaintiffs, making suggestive comments about their attire and requesting that they visit him on his office couch. The court also noted that the plaintiffs had engaged in occasional sexually oriented joking and had once given their supervisor a sexually explicit gift.

When the plaintiffs reported the harassment, the company's EEOC officer interviewed the plaintiffs and told them that remedial action would be taken. The vice president who had harassed the women was summoned from an overseas assignment and given a verbal reprimand and instructions to stop the offensive conduct immediately. The company then assured the plaintiffs that the offensive comments would cease and that their positions with the company were secure. The harassment did in fact stop.

In ruling for the employer, the Eleventh Circuit held that in a hostile environment sexual harassment case, the employer is not strictly liable for the acts of a supervisor, but is liable through *respondeat superior,* i.e., where the employer knew or should have known of the harassment and failed to take action. Therefore, the court found the employer not liable since it took prompt remedial action when informed of the harassment.

The court distinguished its decision in this case from its earlier ruling in *Sparks v. Pilot Freight Carriers* [44] where the supervisor was found to be an employer under Title VII, thereby making the corporate defendant liable for his acts. The court pointed out that *Sparks* involved *quid pro quo* harassment where the supervisor used his authority to compel submission to sexual advances. Here, the supervisor's harassment did not relate to his authority.

The court also rejected the plaintiffs' constructive discharge claim. The court stated that in order to prove such a claim, the plaintiff must demonstrate that working conditions are so intolerable that a reasonable person in that position would be compelled to resign. The plaintiffs here failed to prove their claim since the evidence showed that the supervisor stopped the harassment after he was reprimanded and prior to the plaintiffs' resignation.

END NOTES

1. *Meritor Savings Bank v. Vinson,* 477 U.S. 57 (1986).
2. 879 F.2d 100 (4th Cir. 1989).
3. *Id.* at 104.
4. 830 F.2d 552 (4th Cir. 1987).
5. 879 F.2d at 105-106.
6. *Id.* at 106.
7. *Id.*
8. *Id.* at 107.
9. 887 F.2d 1271 (5th Cir. 1989).
10. *Contra Rabidue v. Osceola Refining Co.,* 805 F.2d 611 (6th Cir. 1986).
11. 819 F.2d 630 (6th Cir. 1987).
12. *Supra* note 1.
13. 799 F.2d 1180 (7th Cir. 1986).
14. 833 F.2d 1226 (7th Cir. 1987).
15. 845 F.2d 1422 (7th Cir. 1988).
16. *Skaddegaard v. Farrel,* 578 F. Supp. 1209 (D.N.J. 1984).
17. 881 F.2d 412 (7th Cir. 1989).
18. 477 U.S. 57, 67 (1986).
19. 798 F.2d 210, 213 (7th Cir. 1986).
20. *Brooms,* 881 F.2d at 419.
21. *Id.* at 421.
22. 842 F.2d 1010 (8th Cir. 1988).
23. 846 F.2d 1154 (8th Cir. 1988).
24. 881 F.2d 1504 (9th Cir. 1989).
25. *Id.* at 1516.
26. 830 F.2d 1554 (11th Cir. 1987).
27. 830 F.2d 552 (4th Cir. 1987).
28. 867 F.2d 184 (4th Cir. 1989).
29. 793 F.2d 714 (5th Cir. 1986).
30. 828 F.2d 307 (5th Cir. 1987).
31. 845 F.2d 104 (5th Cir. 1988).
32. 805 F.2d 644 (6th Cir. 1986).
33. *Supra* note 10.
34. *Id.*
35. 798 F.2d 210 (7th Cir. 1986).
36. 882 F.2d 1235 (7th Cir. 1989).
37. 792 F.2d 746 (8th Cir. 1986) and *Staton v. Maries* 868 F.2d 996 (8th Cir. 1989).
38. 847 F.2d 1368 (9th Cir. 1988).
39. 833 F.2d 1406 (10th Cir. 1987)
40. *Vinson v. Taylor,* 753 F.2d 141, 146 (D.C. Cir. 1985), *aff'd in part, rev'd in part,* 477 U.S. 57 (1986).
41. 878 F.2d 338 (10th Cir. 1989)
42. *Id.* at 339.
43. 867 F.2d 1311 (11th Cir. 1989).
44. *Supra* note 26.

PRACTICAL ADVICE ON HANDLING SEXUAL HARASSMENT IN SCHOOLS*

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I. DEVELOP AND DISSEMINATE POLICY AGAINST SEXUAL HARASSMENT

A. Reasons for Having Written Policy

1) Forms major underpinning of any effective program against sexual harassment.

2) Has more impact than verbal policy.

3) Conveys employer's commitment to workplace free of sexual harassment.

4) Notifies employees of procedures for handling sexual harassment when it occurs.

5) Warns offenders of consequences of sexually harassing another employee.

6) Serves as an important element in defending a sexual harassment charge.

B. What to Include in a Sexual Harassment Policy

1) Explain what sexual harassment is.

—Include legal definition from EEOC Guidelines:

"Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11(a) (1987).

—Use examples of overt and subtle types of harassment that could occur in school setting. General categories should include:

a) uninvited letters, telephone calls or materials of a sexual nature;

b) uninvited and deliberate touching, leaning over, cornering or pinching;

c) uninvited sexually suggestive looks or gestures;

d) uninvited pressure for sexual favors;

e) uninvited pressure for dates;

f) uninvited sexual teasing, jokes, remarks or questions; and

g) attempted or actual rape or sexual assault.

—Note that conduct need not be sexual in nature but can be harassment carried out because victim is of a particular sex, e.g., referring to women as "chicks," "broads," etc.; making statements about women based on stereotypes; suggesting that women should not hold certain positions because they are incapable of carrying out certain functions.

2) State in very clear terms that sexual harassment will not be tolerated.

3) Emphasize the responsibility of supervisors to eliminate sexual harassment.

4) Encourage reporting of sexual harassment.

5) Explain informal and formal procedures for complaining of harassment. Include notice of right to report to a person of same sex or to someone other than the supervisor where the supervisor is the alleged offender.

6) State that retaliating against an employee for making a complaint of sexual harassment or participating in an investigation of alleged harassment is prohibited.

7) Emphasize that complaints will be investigated and handled as discreetly as possible.

8) State the complete array of disciplinary measures up to and including discharge that will be imposed on anyone (including top-level administrators) who violates the policy.

C. Dissemination of Policy

1) Communicate policy to employees.

—At the very least, disseminate sexual harassment policy to the same extent as EEO and other policies.

—Post policy, including grievance procedures and persons to contact to report sexual harassment, on bulletin boards and in other prominent locations.

—Give policy to each employee. Develop, and then update and distribute annually, a pamphlet with key policy points to serve as reference. Pamphlet is less likely to be lost than regular memorandum.

—Give policy to all new employees. Employee handbook is a good mechanism for this. Discuss in orientation sessions.

—Building and district administrators should convey their commitment to policy verbally and in writing.

II. EDUCATE PERSONNEL WITH RESPECT TO SEXUAL HARASSMENT AND COMPLIANCE WITH SCHOOL POLICY

A. Train All Employees

1) Develop a training program to educate employees concerning prohibited conduct and specific sanctions.

2) Tailor the program to your particular work force.

—Employees with little exposure to workplace and who lack knowledge of rights and responsibilities may require more intensive training than "experienced" employees who know what conduct is improper.

3) Use hypotheticals focusing on specific problems that have arisen or could arise.

—Include examples of harassment between employees on the same level, not just between supervisors and subordinates.

4) Give guidance concerning the difference between welcome, consensual relationships and illegal sexual harassment.

—One expert has suggested that those unsure of whether their behavior crosses the line can ask themselves the following questions: 1)Would you behave in this manner if a third person with whom you had a personal relationship were present? 2)Do you and the target of your behavior have roughly equal authority? 3)Does the target initiate similar behavior about as often as you do?

—With regard to specific kinds of behavior, advise employees of the following guidelines. While an isolated infraction of these rules, unless it is extreme or unusually severe, will probably not lead to lawsuits, persistent violations or violations that occur in addition to other forms of sexual harassment may form the basis for a legal claim.

Physical contact—Hugging, kissing, cornering, pinching or other sexual behavior toward another employee should be avoided. A pat on the back or an arm around the shoulder may also be inappropriate depending on the relationship between the two employees.

Dating—Do not pressure someone into accepting a date. Always make clear that an offer can be refused without consequence to the person's job. Do not disguise personal invitations as business related occasions or discuss personal matters at business outings.

Comments on appearance—Nonsexual compliments delivered in a neutral tone with eye-to-eye contact are generally acceptable, e.g., "Your new hair style looks nice." Comments that are blatantly sexual or carry sexual overtones are inappropriate, e.g., adding to the comment above, "I've always heard blondes have more fun!" and then winking, leering or touching the person's hair.

Swearing and dirty jokes—Be sure not to make women (or men) the object of the jokes. If the intention or the effect is to provoke a reaction from, embarrass or demean a particular individual or group, the joke or swearing is a form of harassment.

From advice of Stephen Anderson, Denver equal employment opportunity consultant specializing in sexual harassment, as reported in Saltzman, *Hands off at the Office* by U.S. News and World Report, August 1, 1988 at 58.

5) Stress that harassment does not only depend upon the perpetrator's intention but also upon how the target perceives the behavior or is affected by it. Employees should not assume that a particular behavior that they view as harmless or one that they would welcome if they were the recipient will be perceived in the same manner by the target of their attention. For example, constant comments about a person's appearance may be intended or considered by the giver to be compliments, but may be perceived by the recipient as unwanted sexual attention.

6) Clarify that the victim as well as the harasser may be a woman or a man.

7) Describe what employees should do if they believe harassment has occurred.

—Instruct employees on how to make clear to the harasser that conduct is unwelcome. Victims should make affirmative statements that indicate the conduct is unwelcome, e.g., telling the harasser to stop. However, failure to make such statements does not necessarily mean that the conduct is welcome.

—Explain informal and formal complaint procedures, including how to contact the appropriate persons for assistance.

—Advise employees of their legal rights and responsibilities, including the right to file complaints with outside agencies such as the EEOC or similar state agency.

B. Give Additional Training to Supervisors

1) Emphasize how critical supervisors are to both maintaining an effective program against sexual harassment *and* avoiding ultimate liability.

—They are the most logical management problem-solvers.

—They have the best vantage point to see what's going on.

—Their position of authority makes it especially important that they avoid harassing their subordinates. Stress potential legal liability issues.

2) Be sure supervisors understand the *spirit* and details of school policy.

—Emphasize that harassment impedes district from accomplishing its mission by undermining integrity of employment relationships, debilitating employee morale, and interfering with work productivity of victim and co-workers. Also discuss the economic costs associated with sexual harassment.

3) Alert supervisors to problems of sexual harassment.

—Teach supervisors what sexual harassment is — as with obscenity, they have to know it when they see it.

—To illustrate the kinds of behavior that should be considered undesirable in the workplace, ask supervisors to consider whether they would want their wives or daughters to be treated in such a manner.

—Dispel false notions about sexual harassment, e.g., it is a fictitious problem created by complaining female workers or is the product of militant feminists' imagination; victims invite sexual harassment by their behavior or dress; victims really enjoy the attention, etc.

—Make clear what is expected of supervisors once they are aware of the problem.

4) Educate supervisors on how to handle sexual harassment issues or informal allegations arising outside the complaint process.

—Require supervisors to consult with the EEO director or other individual responsible for handling formal complaints. This consultation will ensure that sexual harassment issues are handled uniformly throughout the district and enable the EEO director to determine whether an investigation is necessary, and if so, how to conduct it.

—Develop a desk reference to assist supervisors in responding to sexual harassment issues that are likely to arise. Include descriptions of the prevailing legal standards, relevant school district regulations and policies and options available to supervisors. Also include useful materials from training programs. Revise the reference periodically to reflect current developments.

5) Explain the supervisor's role in cooperating with the informal and formal complaint process. Stress the importance and benefits of resolving the complaint satisfactorily at the lowest level possible in the complaint process. If a dispute can be resolved on an informal

basis, the district can avoid the expenditure of time and resources associated with formal complaint proceedings and the toll on productive working relationships and morale that can accompany formal proceedings. Make clear that resolutions are not an admission of liability.

6) Emphasize complainants' protection from retaliation for raising sexual harassment issues.

7) Explain specific disciplinary measures that apply to employees found guilty of harassment or retaliation.

8) Strongly discourage supervisors from dating their subordinates and explain the potential ramifications.

9) Be sure supervisors understand they will be evaluated on how well they carry out EEO policies, including the sexual harassment policy.

—Review personnel decisions they make; look for trouble areas.

—Keep track of complaints about individuals.

—Give special training to "problem" supervisors. A "problem" supervisor may be one who does not adequately enforce the school's policy and procedures relating to sexual harassment or who does not appropriately discipline other employees who engage in sexual harassment. A "problem" supervisor may also be one who himself engages in sexual harassment, in which case special training may or may not be an appropriate measure, depending on the severity of the harassing behavior.

C. General Considerations

1) Ensure that trainer presents information in a manner sensitive to all parties concerned. Tone should be educational, not accusatory. Many employers find it practical to use outside consultants to train staff.

2) Hold educational programs on a regular basis for all employees, including those that have already received training.

3) Place periodic columns on sexual harassment and other equal employment opportunity issues in employee newsletter. Describe hypothetical problems, discuss new developments and court decisions, notify employees of training opportunities and events. Question-and-answer column regarding sexual harassment policy and situations and other EEO issues may be helpful.

4) Regularly evaluate training programs to ensure their effectiveness.

III. IMPLEMENT EFFECTIVE COMPLAINT AND INVESTIGATION PROCEDURES

A. Adopt Procedures

1) Describe in specific terms your informal and formal complaint processes.

2) Have a procedure that will make it easy for victim to come forward.

—Females have traditionally been reluctant to come forward with complaints because of embarrassment or fear of retaliation.

—Do not require employee to complain to alleged harasser first.

—Assure complainants that they will not be "put on trial."

—Assure complainants that they will not be subject to retaliation.

—Some commentators have suggested that complaining employee remain anonymous. This is very impractical,

since it makes an effective investigation difficult.

—Employer should assure employees that complaints will be handled "discreetly," and then make sure that they are.

3) Consider handling all formal complaints through one person or office.

—If the school district employs an equal employment opportunity director, this person is the most appropriate employee to fulfill this function. If not, the school district must carefully consider to whom to assign this responsibility. In either case, the person should be someone who has the respect of both employees and management and who will be viewed as fair, impartial and objective. A person whose position or other responsibilities create the appearance of a conflict of interest with the duties of fairly handling sexual harassment complaints should not be selected.

—A female should probably be involved.

—It is easier to train one person to act effectively. Before handling sexual harassment complaints, the person should demonstrate a knowledge and understanding of relevant law and district personnel policies, practices and procedures. The person should also have recognized management skills, the ability to deal effectively and fairly with employees and supervisors and excellent judgment and integrity.

—One person (office) helps ensure evenhanded treatment.

—Finding one good "listener," rather than several, is easier.

—Monitoring of the overall situation is facilitated.

B. Informal Complaint Process

1) Select counselors who have good communication and negotiation skills and who will be respected by employees and managers. Number of counselors may depend on size of work force, percentage of men and women, and number of past incidents of sexual harassment in the district.

2) Widely disseminate the names of counselors through bulletin boards, telephone directories and otherwise.

3) Provide adequate training to counselors to develop their knowledge of personnel policies, practices and procedures and their knowledge of sexual harassment law. Help counselors develop their dispute resolution skills by using mock counseling sessions and realistic examples of problems.

4) Emphasize that complaints will be handled with appropriate confidentiality.

5) Counselors should submit to the EEO director a brief report on each counseling contact at the beginning and close of counseling. This will ensure that the director keeps track of the types and extent of questions or concerns and will allow the director to give information and guidance as necessary. This will also provide a written memorandum of the agreement or resolution reached. Counselors should also report periodically to the EEO Director regarding sexual harassment allegations and concerns so that decisions can be made concerning necessary training or other action to ensure a harassment-free work force.

6) Evaluate counselors regularly.

C. Formal Complaint Process

1) Use a specially designed complaint form to elicit all the necessary information

from the complainant. Insist on specificity as to what happened, including details as to where, when (dates, time of day), frequency, types of behavior, complainant's response, etc.

2) Require that all complaints be signed. Include on the complaint form a statement that the complainant affirms the truth of the statements made. A sworn affidavit may be requested from the complainant where the accused completely denies any wrongdoing and the investigation reveals little other evidence supporting the complaint.

3) Inform complainants and alleged harassers of their procedural rights, including any right to representation.

4) Communicate regularly with complainants and alleged harassers regarding the status of the complaints and the reasons for any delays.

5) Keep complaint and investigation confidential, except for those with need to know, to protect interests of complainant and alleged harasser.

6) Develop instructions regarding appropriate confidentiality to be given to each person involved in the processing of a complaint.

7) Notify insurance carrier, where appropriate.

D. Investigation Process

1) Once a complaint has been received, do not delay the investigation. Establish a standard time line for each step in the complaint, investigation, resolution and appeal process.

—Monitor complaints to ensure that they do not fall behind at any stage of the process.

—Inform complainants in strong terms of their responsibilities to produce documents promptly, attend scheduled interviews and meetings, and return affidavits in accordance with the time limits.

2) Review the personnel files of complainant and accused for anything relevant in their employment histories.

3) Review the plan of investigation prior to the start of an investigation to ensure that all the proper people are interviewed and all relevant documents are requested. Be thorough. Investigators should routinely obtain signed statements from anyone who is interviewed, including the complainant and the accused. This helps promote veracity and makes the statements potentially admissible in administrative proceedings.

4) The EEOC in its Policy Guidance Notice has recommended to its own personnel investigating charges of sexual harassment that they gather such information as:

—detailed evidence of the circumstances and nature of any complaints or protests made by the charging party to the alleged harasser, higher management, co-workers or others;

—reasons why a victim may have delayed in complaining;

—evidence revealing whether the victim's conduct is consistent or inconsistent with her assertion that the sexual conduct is unwelcome (particularly relevant is her behavior toward the alleged harasser);

—responses of the charging party and alleged harasser to detailed questioning;

—any corroborative evidence from managerial employees as well as co-workers;

—statements from persons who observed the charging party's demeanor immediately after an alleged incident of harassment;

—statements from persons with whom the alleged victim discussed the harassing incident;

—any evidence that other employees were sexually harassed by the same person;

—any evidence indicating whether the employer was aware of any other instances of harassment and, if so, the employer's response; and

—if the charging party has been terminated, the reasons for the employer's action and any evidence that proves that the action by the employer or supervisor was for other reasons, i.e., sexual harassment was not a substantial or motivating factor or action would have been taken anyway.

For more information on how to conduct an investigation, see Bump & Frels, *Investigating Alleged Wrongdoing by Employees in the School Setting*, NSBA Council of School Attorneys (1990).

5) Train investigators thoroughly and ensure that they possess strong human relations qualities.

Sensitivity. Even with all the new definitions, sexual harassment is often in the eye of the beholder. Investigator must be able to grasp the nuances and implications of situations.

Intuition. "Her word against his" situations often arises because harassment frequently occurs in private.

Persistence. Natural reaction of alleged harasser to charges of sexual misconduct is to be defensive and less than straightforward.

6) Conduct investigation discreetly in fairness to all concerned.

—Potential slander, invasion of privacy problems could arise.

—May otherwise make situation worse for complaining person.

—All typing, filing, etc., should be done by one person.

7) Consider whether using an "outsider" to conduct the investigation would be advantageous. If an independent investigator is used, make sure that he or she is experienced in conducting sexual harassment investigations, has good analytical and writing skills, has a good reputation as an investigator and clearly understands the parameters and responsibilities involved.

8) Adhere to any collective bargaining agreement that provides the accused with the right to have union representative present.

—This may pose problems in some cases. Presence of representative may hurt effectiveness of the investigation.

9) Maintain complete records of complaints and investigations.

—Proper documentation will be necessary for possible termination proceedings if the sexual harassment charge is confirmed.

—Attempts to contact individuals and time spent on investigation should also be recorded as evidence of *bona fide* effort to resolve the problem.

10) Review the investigation reports promptly to ensure that key evidence is corroborated to the extent possible, and necessary follow-up questions are asked.

—Require investigators to include assessments of credibility and evaluations of the facts in their investigation report.

IV. TAKE PROMPT AND EFFECTIVE CORRECTIVE ACTION

A. Make a decision quickly.

1) Consider whether corrective action is needed in each case, even if a finding of sexual harassment has not been reached. Other factors to consider besides whether there was proof of discrimination include: any evidence that policies were not applied, evidence of inconsistent application of rules, reasonable perceptions by the employees of unfairness, reasonableness of the complainant's demands, and the availability of alternative solutions.

2) Do not allow failure to act to undermine the credibility of the system.

—Harassers feel they can act without consequence. Ineffective policy provides no deterrence.

—Victims view system as ineffective and thus are less likely to use internal complaint procedures. This may allow the harassment to become more egregious, making defense more difficult, or may cause victim to resort to outside agencies to obtain relief.

3) In determining liability, courts may consider employers who fail to remedy sexual harassment to be condoning it.

4) Notify the complainant in writing of the proposed disposition of the matter, including a finding on the issue of sexual harassment and the corrective action to be taken, if any. The disposition should carefully discuss the facts and the law supporting the decision. The complainant should also be advised of any right to appeal.

B. Deal with offending employees immediately.

1) Follow appropriate procedures to safeguard interests of alleged harasser.

2) Use concepts of just cause and progressive discipline.

—Make punishment fit crime.

—Most grievances are on behalf of harasser.

—Many arbitration cases result in modifying discipline imposed by employer because it was too severe.

3) Counsel offending employee about the nature of the problem and what is expected of him.

4) Make periodic checks with the harasser and the victim to ensure that the harassment has in fact ceased and does not reoccur.

C. Do not limit action to discipline of offending employee. Provide appropriate remedies to the victim.

—Give victim the promotion that was denied.

—Reinstate victim if she was fired.

—Transfer victim, if appropriate. Ensure that transfers are not carried out in a discriminatory manner. In some cases, transfer of the harasser, rather than the victim, may be in order.

D. Conflicts with collective bargaining agreements are possible.

—Union has real political problem pitting one member against another.

—But point is, employers are bound by agreement.

V. SYSTEMS FOR IDENTIFICATION OF SPECIAL PROBLEM SITUATIONS — SPECIAL SOLUTIONS

A. Evaluate situations where problems may likely occur.

1) Situations where men/women have to work closely may present problems.

2) Situations where a woman occupies a job traditionally held by males may cause some men to react negatively and try to demean females by reducing things to sexual context.

3) Situations where there are only a few women in a department, job classification or school may make them more vulnerable targets.

4) Department where supervisor has long history of problems may require special attention to ensure no recurrence of prohibited conduct.

B. If a problem is identified, take special actions.

—Counseling or small group meetings may be appropriate.

VI. IMPLEMENT "PREVENTIVE" POLICIES

A. Conduct periodic random, anonymous surveys to determine whether sexual harassment is a problem in a given agency, department or office.

B. Consider stricter dress codes to remove temptations and provocations.

C. Strongly warn supervisors of the risks that inhere in relationships with subordinates.

—The supervisor will allow non-merit factors to influence his judgment.

—Other employees will perceive the relationship as causing favoritism that may harm employee morale and reduce productivity.

—Other employees may bring claims of a hostile work environment; *see King v. Palmer,* 778 F.2d 878 (D.C. Cir 1985); *contra DeCintio v. Westchester Co. Med. Center,* 807 F.2d 304 (2d Cir. 1986); *Yatvin v. Madison Metropolitan School District,* 653 F. Supp. 945 (W.D. Wisc. 1987), *aff'd,* 840 F.2d 412 (7th Cir. 1988).

—If the relationship turns sour, it may lead to subsequent allegations of sexual harassment by the subordinate employee.

—The supervisor might be risking termination if it is established that the end result of a relationship constitutes sexual harassment or influencing of judgment.

1) Provide that the board may take disciplinary action, such as transferring or removing of supervisory authority, if the relationship disrupts productivity or undermines the credibility of the supervisor to perform effectively, even where there is no evidence of harassment or improper influence.

2) Do not make transfers or other adverse action automatic as to the supervisor or the subordinate when there is no indication of sexual harassment or other inappropriate conduct, since there is a possibility that such a mandatory approach could infringe on privacy interests and enforcement could be complicated and intrusive. The employer should ensure that the policy does not operate to the disadvantage of women since they will often be in the subordinate position.

D. Counsel supervisors on styles and tactics of management.

—Avoid double entendres, touching, etc. To be completely safe, any form of physical contact beyond a handshake should be avoided by persons in positions of authority.

—Meetings alone behind closed doors or after hours with employees of the opposite sex should be conducted in a business like manner.

—Do not give personal birthday or holiday gifts.

—Two helpful guidelines: Ask supervisor to consider: 1) would you engage in the same conduct if your spouse or the employee's spouse (significant other) were present? 2) would you subject your mother or daughter to the same conduct? Unless answer is "yes," supervisor should not behave toward any employee in that manner.

E. Consider policy with respect to school parties or social events when males and females are together in tempting situations.

F. Find ways to monitor non-employees who have contact with personnel or students.

VII. SPECIAL CONSIDERATIONS REGARDING HARASSMENT OF STUDENTS

In general, the suggestions for preventing and dealing with harassment of employees apply equally to harassment of students; however, there are some special considerations. Please note that while many times sexual harassment of students also constitutes child abuse, this discussion is not intended to deal with all the ramifications of that problem for schools. While the suggestions made here certainly apply to cases of child abuse, there are also many other considerations that relate to that form of sexual harassment which are not treated here.

A. Policy

1) Office of Civil Rights of the U.S. Department of Education defines sexual harassment under Title IX of Education Amendment of 1972 (which prohibits discrimination on the basis of sex in any program or activity that receives federal funds) as follows: "Verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employee or agent of a recipient that denies, limits, provides different, or conditions the provision of aid, benefits, services or treatment protected under Title IX."

2) Include examples of harassment that students might experience or which may not be recognized as sexual harassment:

—unwanted sexual behavior, such as touching, verbal comments, sexual name calling, spreading sexual rumors, gestures, jokes, pictures, leers, overly personal conversation, cornering or blocking student's movement, pulling at clothes, students "making out"; in the hallway, attempted rape, rape;

Strauss, *Sexual Harassment in the School: Legal Implications for Principals*, National Association of Secondary School Principals Bulletin (March 1988).

—female student in predominantly male class subjected to sexual remarks by students or teacher who regard the comments as joking and part of the usual class environment;

—impeding a girl's progress in classes, such as industrial arts, by hiding her tools or questioning her ability to handle the work or suggesting she is somehow "abnormal" for enrolling in such a class;

—purposefully limiting or denying female students access to educational tools, such as computers; and

—teasing a male student about his enrollment in a home economics class.

B. Procedures

Regulations under Title IX require recipients of federal funds to establish and publish grievance procedures that encompass complaints of sexual harassment. The proce-

dures must provide for "prompt and equitable" resolution of such complaints. 34 C.F.R. 106.8. Suggestions for dealing with allegations of improper employee conduct toward students include the following:

1) School administrators should notify the superintendent of every allegation and/or rumor of improper employee-student relationship.

2) Superintendent should seek specific legal advice from school attorney on how to proceed.

3) Teachers, guidance counselors, nurses, etc., should be required to notify administration of such allegations or rumors. Staff training on their responsibilities with regard to sexual harassment of students may appropriately be included in training programs on sexual harassment among employees.

4) Investigate or refer to the appropriate agency every allegation or rumor. Any investigation should include at a minimum:

—Counselor or administrator of same sex as student should interview the student after giving parents notice of their right to attend the interview with their child. Conduct the interview in a non-intimidating environment in order to elicit truthfulness and full disclosure. Ask student to make a written statement and sign it. Refusal of student to sign document should not end inquiry.

—Interview employee, after notice of nature of inquiry and noting right to representation by union and/or counsel. State nature of allegations, without necessarily identifying particular student(s). Request written, signed statement by employee.

5) Conduct diligent investigation. Sexual abuse by a school employee frequently involves multiple incidents and multiple students over a period of years.

6) Never discourage a student complaint with words such as:"It will just be your word against his," "Do you see how this makes you look?", "Do you know what could happen to Mr. X?," etc.

7) Do not be influenced by (apparent or actual) promiscuousness of complaining student or whether student may have invited the attention. These factors are irrelevant and will not provide a defense for failure to act.

8) Do not rely on potentially misplaced loyalty to staff; the offending employee is sometimes the one you would least suspect and/or one who has immense student/community popularity.

9) Do not end the inquiry simply because a student recants a prior statement. Recanting may be a mechanism to avoid embarrassment or humiliation.

10) Keep the child's parents informed of the progress of the investigation.

11) Avoid commingling counselling and investigative functions.

C. Compliance with Child Abuse Reporting Laws

Where form of harassment constitutes child abuse, school district must also comply with reporting requirements and other obligations under child abuse laws.

D. Education of Students about Sexual Harassment

1) Publicize policy prohibiting sexual harassment of students in student handbooks distributed to all students.

2) Communicate policy through memos, posters, flyers, school newspapers,

special pamphlets and guidelines to work site supervisors.

3) Educate students about what sexual harassment is, what to do and who to report to if they feel threatened or victimized.

4) Emphasize that sexual harassment can be committed by other students as well as adults.

5) Do not be deterred from setting up policies and procedures and informing students about them because of the possibility that students who are enlightened about sexual harassment could file false charges in order to retaliate against a teacher or school official. According to some experts, there is little evidence to suggest that students frequently fabricate allegations of sexual misconduct by school employees for ulterior motives.

E. Release of Information about Former Staff

1) Inform prospective employers of a former employee's adjudication of sexual impropriety or resignation in the face of accusations of sexual misconduct.

2) Agreements between the school district and accused employees who choose to resign about what the district may say in response to inquiries from future prospective employers should be carefully considered. They may not be appropriate where the district has substantial evidence to support a belief that the resigning employee has actually engaged in heinous sexual misconduct, particularly with students.

3) If school district intends to withhold information requested by a prospective employer, determine if there is any possible liability for this practice.

4) Before releasing any information not involving adjudication of misconduct, make sure it is accurate and conforms with any applicable agreements and/or laws in order to avoid any potential liability. Report facts, not conclusions of guilt or opinions.

F. Other Preventive Measures

1) Do thorough pre-employment reference checks for all employees, including part-time workers and substitutes.

—Adopt written procedures to follow in conducting pre-employment investigations.

—Ensure that all questions asked on employment applications and during interviews conform with civil rights laws.

—Review answers on applications. Question the applicant about any gaps in employment. Be sure not to use the information obtained to discriminate on an impermissible basis; e.g., refusal to hire a teacher based solely on marital status.

—Contact listed references and past employers to establish character of applicant. Document any refusal by an employer to divulge information based on that employer's policy not to release any information about former employees.

—Require a criminal record check as a final condition of employment where permitted by law.

—Check the names of prospective employees against the state's child abuse registry for a possible match.

—Verify applicant's license or certificate.

—Require applicants to sign a waiver releasing former employers from liability for disclosing personnel records and appraisals of the

applicant's performance. If the prospective employee refuses to consent, ask why.

—Document and maintain the responses obtained from reference checks and from other background information checks.

—Inform applicant that providing false information is grounds for a refusal to hire or dismissal.

—Do not offer employment until all background information has been verified or received.

2) Regularly evaluate student placement work sites for evidence of sexual harassment.

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* This outline has been derived in large part from materials authored by Fay Hartog-Rapp of Seyfarth, Shaw, Fairweather and Geraldson, Chicago, IL; Patricia R. Ambrose and David Tatel of Hogan and Hartson, Washington, D.C.; Edgar H. Bittle of Ahlers, Cooney, Dorweiler, Haynie, Smith & Allbee, Des Moines, IA; Michael W. King of Stock and Leader, New York, NY; Michael I. Levin of Cleckner and Fearen, Abington, PA; Marcia Greenberger of the National Women's Law Center, Washington, D.C.; Thomas A. Mickes of Peper, Martin, Jensen, Maichel & Hetlage, St. Louis, MO; Benjamin Ferrara of Scolaro, Shulman, Cohen, Lawler & Burnstein, Syracuse, NY; U.S. Equal Employment Opportunity Commision; and the U.S. Merit System Protection Board.

APPENDIX A

MERITOR SAVINGS BANK, FSB V. VINSON

No. 84-1979

MERITOR SAVINGS BANK, FSB, PETITIONER *v.*
MECHELLE VINSON ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Syllabus

No. 84-1979. Argued March 25, 1986—Decided June 19, 1986

Respondent former employee of petitioner bank brought an action against the bank and her supervisor at the bank, claiming that during her employment at the bank she had been subjected to sexual harassment by the supervisor in violation of Title VII of the Civil Rights Act of 1964, and seeking injunctive relief and damages. At the trial, the parties pre-

sented conflicting testimony about the existence of a sexual relationship between respondent and the supervisor. The District Court denied relief without resolving the conflicting testimony, holding that if respondent and the supervisor did have a sexual relationship, it was voluntary and had nothing to do with her continued employment at the bank, and that therefore respondent was not the victim of sexual harassment. The court then went on to hold that since the bank was without notice, it could not be held liable for the supervisor's alleged sexual harassment. The Court of Appeals reversed and remanded. Noting that a violation of Title VII may be predicated on either of two types of sexual harassment—(1) harassment that involves the conditioning of employment benefits on sexual favors, and (2) harassment that, while not affecting economic benefits, creates a hostile or offensive working environment—the Court of Appeals held that since the grievance here was of the second type and the District Court had not considered whether a violation of this type had occurred, a remand was necessary. The court further held that the need for a remand was not obviated by the fact that the District Court had found that any sexual relationship between respondent and the supervisor was a voluntary one, a finding that might have been based on testimony about respondent's "dress and personal fantasies" that "had no place in the litigation." As to the bank's liability, the Court of Appeals held that an employer is absolutely liable for sexual harassment by supervisory personnel, whether or not the employer knew or should have known about it.

Held:

1. A claim of "hostile environment" sexual harassment is a form of sex discrimination that is actionable under Title VII.

(a) The language of Title VII is not limited to "economic" or "tangible" discrimination. Equal Employment Opportunity Commission guidelines fully support the view that sexual harassment leading to noneconomic injury can violate Title VII. Here, respondent's allegations were sufficient to state a claim for "hostile environment" sexual harassment.

(b) The District Court's findings were insufficient to dispose of respondent's "hostile environment" claim. The District Court apparently erroneously believed that a sexual harassment claim will not lie absent an *economic* effect on the complainant's employment, and erroneously focused on the "voluntariness" of respondent's participation in the claimed sexual episodes. The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her participation in them was voluntary.

(c) The District Court did not err in admitting evidence of respondent's sexually provocative speech and dress. While "voluntariness" in the sense of consent is no defense to a sexual harassment claim, it does not follow that such evidence is irrelevant as a matter of law in determining whether the complainant found particular sexual advances unwelcome.

2. The Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors. While common-law agency principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. In this case, however, the mere existence of a grievance procedure in the bank and the bank's policy against discrimination, coupled with respondent's failure to invoke that procedure, do not necessarily insulate the bank from liability.

243 U. S. App. D. C. 323, 753 F. 2d 141, affirmed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, STEVENS, and O'CONNOR, JJ., joined. STEVENS, J., filed a concurring opinion. MARSHALL, J., filed an opinion concurring in the judgment, in which BRENNAN, BLACKMUN, and STEVENS, JJ., joined.

JUSTICE REHNQUIST delivered the opinion of the Court.

This case presents important questions concerning claims of workplace "sexual harassment" brought under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. §2000e *et seq.*

I

In 1974, respondent Mechelle Vinson met Sidney Taylor, a vice president of what is now petitioner Meritor Savings Bank (the bank) and manager of one of its branch offices. When respondent asked whether she might obtain employment at the bank, Taylor gave her an application, which she completed and returned the next day; later that same day Taylor called her to say that she had been hired. With Taylor as her supervisor, respondent started as a teller-trainee, and thereafter was promoted to teller, head teller, and assistant branch manager. She worked at the same branch for four years, and it is undisputed that her advancement there was based on merit alone. In September 1978, respondent notified Taylor that she was taking sick leave for an indefinite period. On November 1, 1978, the bank discharged her for excessive use of that leave.

Respondent brought this action against Taylor and the bank, claiming that during her four years at the bank she had "constantly been subjected to sexual harassment" by Taylor in violation of Title VII. She sought injunctive relief, compensatory and punitive damages against Taylor and the bank, and attorney's fees.

At the 11-day bench trial, the parties presented conflicting testimony about Taylor's behavior during respondent's employment.* Respondent testified that during her probationary period as a teller-trainee, Taylor treated her in a fatherly way and made no sexual advances. Shortly thereafter, however, he invited her out to dinner and, during the course of the meal, suggested that they go to a motel to have sexual relations. At first she refused, but out of what she described as fear of losing her job she eventually agreed. According to respondent, Taylor thereafter made repeated demands upon her for sexual favors, usually at the branch, both during and after business hours; she estimated that over the next several years she had intercourse with him some 40 or 50 times. In addition, respondent testified that Taylor fondled her in front of other employees, followed her into the women's restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions. These activities ceased after 1977, respondent stated, when she started going with a steady boyfriend.

Respondent also testified that Taylor touched and fondled other women employees of the bank, and she attempted to call witnesses to support this charge. But while some supporting testimony apparently was admitted without objection, the District Court did not allow her "to present wholesale evidence of a pattern and practice relating to sexual advances to other female employees in her case in chief, but advised her that she might well be able to present such evidence in rebuttal to the defendants' cases." *Vinson* v. *Taylor*, 22 EPD ¶30708, pp. 14688–14689, 23 FEP Cases 37, 38–39, n. 1 (D DC 1980). Respondent did not offer such evidence in rebuttal. Finally, respondent testified that because she was afraid of Taylor she never reported his harassment to any of his supervisors and never attempted to use the bank's complaint procedure.

Taylor denied respondent's allegations of sexual activity, testifying that he never fondled her, never made suggestive remarks to her, never engaged in sexual intercourse with her and never asked her to do so. He contended instead that respondent made her accusations in response to a business-related dispute. The bank also denied respondent's allegations and asserted that any sexual harassment by Taylor was unknown to the bank and engaged in without its consent or approval.

The District Court denied relief, but did not resolve the conflicting testimony about the existence of a sexual relationship between respondent and Taylor. It found instead that

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*Like the Court of Appeals, this Court was not provided a compete transcript of the trial. We therefore rely largely on the District Court's opinion for the summary of the relevant testimony.

> "If [respondent] and Taylor did engage in an intimate or sexual relationship during the time of [respondent's] employment with [the bank], that relationship was a voluntary one having nothing to do with her continued employment at [the bank] or her advancement or promotions at that institution." *Id.*, at 42 (footnote omitted).

The court ultimately found that respondent "was not the victim of sexual harassment and was not the victim of sexual discrimination" while employed at the bank. *Id.*, 43.

Although it concluded that respondent had not proved a violation of Title VII, the District Court nevertheless went on to address the bank's liability. After noting the bank's express policy against discrimination, and finding that neither respondent nor any other employee had ever lodged a complaint about sexual harassment by Taylor, the court ultimately concluded that "the bank was without notice and cannot be held liable for the alleged actions of Taylor." *Id.*, at 42.

The Court of Appeals for the District of Columbia Circuit reversed. 243 U. S. App. D. C. 323, 753 F. 2d 141 (1985). Relying on its earlier holding in *Bundy* v. *Jackson*, 205 U. S. App. D. C. 444, 641 F. 2d 934 (1981), decided after the trial in this case, the court stated that a violation of Title VII may be predicated on either of two types of sexual harassment: harassment that involves the conditioning of concrete employment benefits on sexual favors, and harassment that, while not affecting economic benefits, creates a hostile or offensive working environment. The court drew additional support for this position from the Equal Employment Opportunity Commission's Guidelines on Discrimination Because of Sex, 29 CFR §1604.11(a) (1985), which set out these two types of sexual harassment claims. Believing that "Vinson's grievance was clearly of the [hostile environment] type," 243 U. S. App. D. C., at 327, 753 F. 2d, at 145, and that the District Court had not considered whether a violation of this type had occurred, the court concluded that a remand was necessary.

The court further concluded that the District Court's finding that any sexual relationship between respondent and Taylor "was a voluntary one" did not obviate the need for a remand. "[U]ncertain as to precisely what the [district] court meant" by this finding, the Court of Appeals held that if the evidence otherwise showed that "Taylor made Vinson's toleration of sexual harassment a condition of her employment," her voluntariness "had no materiality whatsoever." *Id.*, at 328, 753 F. 2d, at 146. The court then surmised that the District Court's finding of voluntariness might have been based on "the voluminous testimony regarding respondent's dress and personal fantasies," testimony that the Court of Appeals believed "had no place in this litigation." *Id.*, at 328, 336, 753 F. 2d, at 146, n. 36.

As to the bank's liability, the Court of Appeals held that an employer is absolutely liable for sexual harassment practiced by supervisory personnel, whether or not the employer knew or should have known about the misconduct. The court relied chiefly on Title VII's definition of "employer" to include "any agent of such a person," 42 U. S. C. §2000e(b), as well as on the EEOC guidelines. The court held that a supervisor is an "agent" of his employer for Title VII purposes, even if he lacks authority to hire, fire, or promote, since "the mere existence—or even the appearance—of a significant degree of influence in vital job decisions gives any supervisor the opportunity to impose on employees." 243 U. S. App. D. C., at 332, 753 F. 2d, at 150.

In accordance with the foregoing, the Court of Appeals reversed the judgment of the District Court and remanded the case for further proceedings. A subsequent suggestion for rehearing en banc was denied, with three judges dissenting. 245 U. S. App. D. C. 1330, 760 F. 2d 1330 (1985). We granted certiorari, 474 U. S. —— (1985), and now affirm but for different reasons.

II

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. §2000e–2(a)(1). The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives. 110 Cong. Rec. 2577–2584 (1964). The principal argument in opposition to the amendment was that "sex discrimination" was sufficiently different from other types of discrimination that it ought to receive separate legislative treatment. See *id.*, at 2577 (Statement of Rep. Celler quoting letter from United States Department of Labor); *id.*, at 2584 (statement of Rep. Green). This argument was defeated, the bill quickly passed as amended, and we are left with little legislative history to guide us in interpreting the the Act's prohibition against discrimination based on "sex."

Respondent argues, and the Court of Appeals held, that unwelcome sexual advances that create an offensive or hostile working environment violate Title VII. Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor "discriminate[s]" on the basis of sex. Petitioner apparently does not challenge this proposition. It contends instead that in prohibiting discrimination with respect to "compensation, terms, conditions, or privileges" of employment, Congress was concerned with what petitioner describes as "tangible loss" of "an economic character," not "purely psychological aspects of the workplace environment." Brief for Petitioner 30–31, 34. In support of this claim petitioner observes that in both the legislative history of Title VII and this Court's Title VII decisions, the focus has been on tangible, economic barriers erected by discrimination.

We reject petitioner's view. First, the language of Title VII is not limited to "economic" or "tangible" discrimination. The phrase "terms, conditions, or privileges of employment" evinces a congressional intent "'to strike at the entire spectrum of disparate treatment of men and women'" in employment. *Los Angeles Department of Water and Power* v. *Manhart*, 435 U. S. 702, 707, n. 13 (1978), quoting *Sprogis* v. *United Air Lines, Inc.*, 444 F. 2d 1194, 1198 (CA7 1971). Petitioner has pointed to nothing in the Act to suggest that Congress contemplated the limitation urged here.

Second, in 1980 the EEOC issued guidelines specifying that "sexual harassment," as there defined, is a form of sex discrimination prohibited by Title VII. As an "administrative interpretation of the Act by the enforcing agency," *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 433–434 (1971), these guidelines, "'while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance,'" *General Electric Co.* v. *Gilbert*, 429 U. S. 125, 141–142 (1976), quoting *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944). The EEOC guidelines fully support the view that harassment leading to noneconomic injury can violate Title VII.

In defining "sexual harassment," the guidelines first describe the kinds of workplace conduct that may be actionable under Title VII. These include "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physi-

cal conduct of a sexual nature." 29 CFR § 1604.11(a) (1985). Relevant to the charges at issue in this case, the guidelines provide that such sexual misconduct constitutes prohibited "sexual harassment," whether or not it is directly linked to the grant or denial of an economic *quid pro quo*, where "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." § 1604.11(a)(3).

In concluding that so-called "hostile environment" (*i. e.*, non *quid pro quo*) harassment violates Title VII, the EEOC drew upon a substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult. See generally 45 Fed. Reg. 74676 (1980). *Rogers* v. *EEOC*, 454 F. 2d 234 (CA5 1971), cert. denied, 406 U. S. 957 (1972), was apparently the first case to recognize a cause of action based upon a discriminatory work environment. In *Rogers*, the Court of Appeals for the Fifth Circuit held that a Hispanic complainant could establish a Title VII violation by demonstrating that her employer created an offensive work environment for employees by giving discriminatory service to its Hispanic clientele. The court explained that an employee's protections under Title VII extend beyond the economic aspects of employment:

> "[T]he phrase 'terms, conditions or privileges of employment' in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers . . . ." 454 F. 2d, at 238.

Courts applied this principle to harassment based on race, *e. g.*, *Firefighters Institute for Racial Equality* v. *St. Louis*, 549 F. 2d 506, 514–515 (CA8), cert. denied *sub nom. Banta* v. *United States*, 178 U. S. App. D. C. 91, 98, 434 U. S. 819 (1977); *Gray* v. *Greyhound Lines, East*, 178 U. S. App. D. C. 91, 98, 545 F. 2d 169, 176 (1976), religion, *e. g.*, *Compston* v. *Borden, Inc.*, 424 F. Supp. 157 (SD Ohio 1976), and national origin, *e. g.*, *Cariddi* v. *Kansas City Chiefs Football Club*, 568 F. 2d 87, 88 (CA8 1977). Nothing in Title VII suggests that a hostile environment based on discriminatory *sexual* harassment should not be likewise prohibited. The guidelines thus appropriately drew from, and were fully consistent with, the existing caselaw.

Since the guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment. As the Court of Appeals for the Eleventh Circuit wrote in *Henson* v. *Dundee*, 682 F. 2d 897, 902 (1982):

> "Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a guantlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets."

Accord, *Katz* v. *Dole*, 709 F. 2d 251, 254–255 (CA4 1983); *Bundy* v. *Jackson*, 205 U. S. App. D. C. 444, 641 F. 2d, at 934–944 (1981); *Zabkowicz* v. *West Bend Co.*, 589 F. Supp. 780 (ED Wisc. 1984).

Of course, as the courts in both *Rogers* and *Henson* recognized, not all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII. See *Rogers* v. *EEOC*, *supra*, at 238 ("mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" would not affect the conditions of employment to sufficiently significant degree to violate Title VII); *Henson*, *supra*, at 904 (quoting same). For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment." *Ibid.* Respondent's allegations in this case—which include not only pervasive harassment but also criminal conduct of the most serious nature—are plainly sufficient to state a claim for "hostile environment" sexual harassment.

The question remains, however, whether the District Court's ultimate finding that respondent "was not the victim of sexual harassment," 22 EPD ¶30708, at 14692–14693, 23 FEP Cases, at 43, effectively disposed of respondent's claim. The Court of Appeals recognized, we think correctly, that this ultimate finding was likely based on one or both of two erroneous views of the law. First, the District Court apparently believed that a claim for sexual harassment will not lie absent an *economic* effect on the complainant's employment. See *ibid.* ("It is without question that sexual harassment of female employees in which they are asked or required to submit to sexual demands as a *condition to obtain employment or to maintain employment or to obtain promotions* falls within protection of Title VII.") (emphasis added). Since it appears that the District Court made its findings without ever considering the "hostile environment" theory of sexual harassment, the Court of Appeals' decision to remand was correct.

Second, the District Court's conclusion that no actionable harassment occurred might have rested on its earlier "finding" that "[i]f [respondent] and Taylor did engage in an intimate or sexual relationship . . . , that relationship was a voluntary one." *Id.*, at 14692, 23 FEP cases, at 42. But the fact that sex-related conduct was "voluntary," in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. The gravamen of any sexual harassment claim is that the alleged sexual advances were "unwelcome." 29 CFR § 1604.11(a) (1985). While the question whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact, the District Court in this case erroneously focused on the "voluntariness" of respondent's participation in the claimed sexual episodes. The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.

Petitioner contends that even if this case must be remanded to the District Court, the Court of Appeals erred in one of the terms of its remand. Specifically, the Court of Appeals stated that testimony about respondent's "dress and personal fantasies," 243 U. S. App. D. C. at 328, n. 36, 753 F. 2d, at 146, n. 36, which the District Court apparently admitted into evidence, "had no place in this litigation." *Ibid.* The apparent ground for this conclusion was that respondent's voluntariness *vel non* in submitting to Taylor's advances was immaterial to her sexual harassment claim. While "voluntariness" in the sense of consent is not a defense to such a claim, it does not follow that a complainant's sexually provocative speech or dress is irrelevant as a matter of law in deter-

mining whether he or she found particular sexual advances unwelcome. To the contrary, such evidence is obviously relevant. The EEOC guidelines emphasize that the trier of fact must determine the existence of sexual harassment in light of "the record as a whole" and "the totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred." 29 CFR § 1604.11(b) (1985). Respondent's claim that any marginal relevance of the evidence in question was outweighed by the potential for unfair prejudice is the sort of argument properly addressed to the District Court. In this case the District Court concluded that the evidence should be admitted, and the Court of Appeals' contrary conclusion was based upon the erroneous, categorical view that testimony about provocative dress and publicly expressed sexual fantasies "had no place in this litigation." 243 U. S. App. D. C., at 328, n. 36, 753 F. 2d, at 146, n. 36. While the District Court must carefully weigh the applicable considerations in deciding whether to admit evidence of this kind, there is no *per se* rule against its admissibility.

III

Although the District Court concluded that respondent had not proved a violation of Title VII, it nevertheless went on to consider the question of the bank's liability. Finding that "the bank was without notice" of Taylor's alleged conduct, and that notice to Taylor was not the equivalent of notice to the bank, the court concluded that the bank therefore could not be held liable for Taylor's alleged actions. The Court of Appeals took the opposite view, holding that an employer is strictly liable for a hostile environment created by a supervisor's sexual advances, even though the employer neither knew nor reasonably could have known of the alleged misconduct. The court held that a supervisor, whether or not he possesses the authority to hire, fire, or promote, is necessarily an "agent" of his employer for all Title VII purposes, since "even the appearance" of such authority may enable him to impose himself on his subordinates.

The parties and *amici* suggest several different standards for employer liability. Respondent, not surprisingly, defends the position of the Court of Appeals. Noting that Title VII's definition of "employer" includes any "agent" of the employer, she also argues that "so long as the circumstance is work-related, the supervisor is the employer and the employer is the supervisor." Brief for Respondent 27. Notice to Taylor that the advances were unwelcome, therefore, was notice to the bank.

Petitioner argues that respondent's failure to use its established grievance procedure, or to otherwise put it on notice of the alleged misconduct, insulates petitioner from liability for Taylor's wrongdoing. A contrary rule would be unfair, petitioner argues, since in a hostile environment harassment case the employer often will have no reason to know about, or opportunity to cure, the alleged wrongdoing.

The EEOC, in its brief as *amicus curiae*, contends that courts formulating employer liability rules should draw from traditional agency principles. Examination of those principles has led the EEOC to the view that where a supervisor exercises the authority actually delegated to him by his employer, by making or threatening to make decisions affecting the employment status of his subordinates, such actions are properly imputed to the employer whose delegation of authority empowered the supervisor to undertake them. Brief for United States and Equal Employment Opportunity Commission as *Amicus Curiae* 22. Thus, the courts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel, whether or not the employer knew, should have known, or approved of the supervisor's actions. *E. g., Anderson* v. *Methodist Evangelical Hospital, Inc.*, 464 F. 2d 723, 725 (CA6 1972).

The EEOC suggests that when a sexual harassment claim rests exclusively on a "hostile environment" theory, however, the usual basis for a finding of agency will often disappear. In that case, the EEOC believes, agency principles lead to

> "a rule that asks whether a victim of sexual harassment had reasonably available an avenue of complaint regarding such harassment, and, if available and utilized, whether that procedure was reasonably responsive to the employee's complaint. If the employer has an expressed policy against sexual harassment and has implemented a procedure specifically designed to resolve sexual harassment claims, and if the victim does not take advantage of that procedure, the employer should be shielded from liability absent actual knowledge of the sexually hostile environment (obtained, *e. g.*, by the filing of a charge with the EEOC or a comparable state agency). In all other cases, the employer will be liable if it has actual knowledge of the harassment or if, considering all the facts of the case, the victim in question had no reasonably available avenue for making his or her complaint known to appropriate management officials." Brief for United States and Equal Opportunity Employment Commission as *Amici Curiae*, 26.

As respondent points out, this suggested rule is in some tension with the EEOC guidelines, which hold an employer liable for the acts of its agents without regard to notice. 29 CFR § 1604.11(c) (1985). The guidelines do require, however, an "examin[ation of] the circumstances of the particular employment relationship and the job [f]unctions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity." *Ibid.*

This debate over the appropriate standard for employer liability has a rather abstract quality about it given the state of the record in this case. We do not know at this stage whether Taylor made any sexual advances toward respondent at all, let alone whether those advances were unwelcome, whether they were sufficiently pervasive to constitute a condition of employment, or whether they were "so pervasive and so long continuing . . . that the employer must have become conscious of [them]," *Taylor* v. *Jones*, 653 F. 2d 1193, 1197–1199 (CA8 1981) (holding employer liable for racially hostile working environment based on constructive knowledge).

We therefore decline the parties' invitation to issue a definitive rule on employer liability, but we do agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area. While such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer, 42 U. S. C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. For this reason, we hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors. See generally Restatement (Second) of Agency §§ 219–237 (1958). For the same reason, absence of notice to an employer does not necessarily insulate that employer from liability. *Ibid.*

Finally, we reject petitioner's view that the mere existence of a grievance procedure and a policy against discrimination, coupled with respondent's failure to invoke that procedure,

must insulate petitioner from liability. While those facts are plainly relevant, the situation before us demonstrates why they are not necessarily dispositive. Petitioner's general nondiscrimination policy did not address sexual harassment in particular, and thus did not alert employees to their employer's interest in correcting that form of discrimination. App. 25. Moreover, the bank's grievance procedure apparently required an employee to complain first to her supervisor, in this case Taylor. Since Taylor was the alleged perpetrator, it is not altogether surprising that respondent failed to invoke the procedure and report her grievance to him. Petitioner's contention that respondent's failure should insulate it from liability might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward.

IV

In sum, we hold that a claim of "hostile environment" sex discrimination is actionable under Title VII, that the District Court's findings were insufficient to dispose of respondent's hostile environment claim, and that the District Court did not err in admitting testimony about respondent's sexually provocative speech and dress. As to employer liability, we conclude that the Court of Appeals was wrong to entirely disregard agency principles and impose absolute liability on employers for the acts of their supervisors, regardless of the circumstances of a particular case.

Accordingly, the judgment of the Court of Appeals reversing the judgment of the District Court is affirmed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, concurring.

Because I do not see any inconsistency between the two opinions, and because I believe the question of statutory construction that JUSTICE MARSHALL has answered is fairly presented by the record, I join both the Court's opinion and JUSTICE MARSHALL's opinion.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE STEVENS join, concurring in the judgment.

I fully agree with the Court's conclusion that workplace sexual harassment is illegal, and violates Title VII. Part III of the Court's opinion, however, leaves open the circumstances in which an employer is responsible under Title VII for such conduct. Because I believe that question to be properly before us, I write separately.

The issue the Court declines to resolve is addressed in the EEOC Guidelines on Discrimination Because of Sex, which are entitled to great deference. See *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 433–434 (1971) (EEOC Guidelines on Employment Testing Procedures of 1966); see also *ante*, at 6. The Guidelines explain:

> "Applying general Title VII principles, an employer . . . is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.
>
> "With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action." 29 CFR §§ 1604.11(c),(d) (1985).

The Commission, in issuing the Guidelines, explained that its rule was "in keeping with the general standard of employer liability with respect to agents and supervisory employees. . . . [T]he Commission and the courts have held for years that an employer is liable if a supervisor or an agent violates the Title VII, regardless of knowledge or any other mitigating factor." 45 Fed. Reg. 74676 (1980). I would adopt the standard set out by the Commission.

An employer can act only through individual supervisors and employees; discrimination is rarely carried out pursuant to a formal vote of a corporation's board of directors. Although an employer may sometimes adopt company-wide discriminatory policies violative of Title VII, acts that may constitute Title VII violations are generally effected through the actions of individuals, and often an individual may take such a step even in defiance of company policy. Nonetheless, Title VII remedies, such as reinstatement and backpay, generally run against the employer as an entity.[1] The question thus arises as to the circumstances under which an employer will be held liable under Title VII for the acts of its employees.

The answer supplied by general Title VII law, like that supplied by federal labor law, is that the act of a supervisory employee or agent is imputed to the employer.[2] Thus, for example, when a supervisor discriminatorily fires or refuses to promote a black employee, that act is, without more, considered the act of the employer. The courts do not stop to consider whether the employer otherwise had "notice" of the action, or even whether the supervisor had actual authority to act as he did. *E. g.*, *Flowers* v. *Crouch-Walker Corp.*, 552 F. 2d 1277, 1282 (CA7 1977); *Young* v. *Southwestern Savings and Loan Assn.*, 509 F. 2d 140 (CA5 1975); *Anderson* v. *Methodist Evangelical Hospital, Inc.*, 464 F. 2d 723 (CA6 1972). Following that approach, every Court of Appeals that has considered the issue has held that sexual harassment by supervisory personnel is automatically imputed to the employer when the harassment results in tangible job detriment to the subordinate employee. See *Horn* v. *Duke Homes, Inc., Div. of Windsor Mobile Homes*, 755 F. 2d 599, 604–606 (CA7 1985); *Vinson* v. *Taylor*, 243 U. S. App. D. C. 323, 329–334, 753 F. 2d 141, 147–152 (1985); *Craig* v. *Y&Y Snacks, Inc.*, 721 F. 2d 77, 80–81 (CA3 1983); *Katz* v. *Dole*, 709 F. 2d 251, 255, n. 6 (CA4 1983); *Henson* v. *City of Dundee*, 682 F. 2d 897, 910 (CA11 1982); *Miller* v. *Bank of America*, 600 F. 2d 211, 213 (CA9 1979).

The brief filed by the Solicitor General on behalf of the EEOC in this case suggests that a different rule should apply when a supervisor's harassment "merely" results in a discriminatory work environment. The Solicitor General

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[1] The remedial provisions of Title VII were largely modeled on those of the National Labor Relations Act (NLRA). See *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 419, and n. 11 (1975); see also *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 768–770 (1976).

[2] For NLRA cases, see, *e. g.*, *Graves Trucking, Inc.* v. *NLRB*, 692 F. 2d 470 (CA7 1982); *NLRB* v. *Kaiser Agricultural Chemical, Division of Kaiser Aluminum & Chemical Corp.*, 473 F. 2d 374, 384 (CA5 1973); *Amalgamated Clothing Workers of America* v. *NLRB*, 124 U. S. App. D. C. 365, 377, 365 F. 2d 898, 909 (1966).

concedes that sexual harassment that affects tangible job benefits is an exercise of authority delegated to the supervisor by the employer, and thus gives rise to employer liability. But, departing from the EEOC Guidelines, he argues that the case of a supervisor merely creating a discriminatory work environment is different because the supervisor "is not exercising, or threatening to exercise, actual or apparent authority to make personnel decisions affecting the victim." Brief for United States and EEOC as *Amici Curiae* 24. In the latter situation, he concludes, some further notice requirement should therefore be necessary.

The Solicitor General's position is untenable. A supervisor's responsibilities do not begin and end with the power to hire, fire, and discipline employees, or with the power to recommend such actions. Rather, a supervisor is charged with the day-to-day supervision of the work environment and with ensuring a safe, productive, workplace. There is no reason why abuse of the latter authority should have different consequences than abuse of the former. In both cases it is the authority vested in the supervisor by the employer that enables him to commit the wrong: it is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates. There is therefore no justification for a special rule, to be applied *only* in "hostile environment" cases, that sexual harassment does not create employer liability until the employee suffering the discrimination notifies other supervisors. No such requirement appears in the statute, and no such requirement can coherently be drawn from the law of agency.

Agency principles and the goals of Title VII law make appropriate some limitation on the liability of employers for the acts of supervisors. Where, for example, a supervisor has no authority over an employee, because the two work in wholly different parts of the employer's business, it may be improper to find strict employer liability. See 29 CFR § 1604.11(c) (1985). Those considerations, however, do not justify the creation of a special "notice" rule in hostile environment cases.

Further, nothing would be gained by crafting such a rule. In the "pure" hostile environment case, where an employee files an EEOC complaint alleging sexual harassment in the workplace, the employee seeks not money damages but injunctive relief. See *Bundy* v. *Jackson*, 205 U. S. App. D. C. 444, 446, 641 F. 2d 934, 936, n. 12 (1981). Under Title VII, the EEOC must notify an employer of charges made against it within 10 days after receipt of the complaint. 42 U. S. C. § 2000e–5(b). If the charges appear to be based on "reasonable cause," the EEOC must attempt to eliminate the offending practice through "informal methods of conference, conciliation, and persuasion." *Ibid.* An employer whose internal procedures assertedly would have redressed the discrimination can avoid injunctive relief by employing these procedures after receiving notice of the complaint or during the conciliation period. Cf. Brief for United States and EEOC as *Amici Curiae* 26. Where a complainant, on the other hand, seeks backpay on the theory that a hostile work environment effected a constructive termination, the existence of an internal complaint procedure may be a factor in determining not the employer's liability but the remedies available against it. Where a complainant without good reason bypassed an internal complaint procedure she knew to be effective, a court may be reluctant to find constructive termination and thus to award reinstatement or backpay.

I therefore reject the Solicitor General's position. I would apply in this case the same rules we apply in all other Title VII cases, and hold that sexual harassment by a supervisor of an employee under his supervision, leading to a discriminatory work environment, should be imputed to the employer for Title VII purposes regardless of whether the employee gave "notice" of the offense.

F. ROBERT TROLL JR., Washington, D. C. (CHARLES H. FLEISCHER, RANDALL C. SMITH, and ROSS, MARSH & FOSTER, with him on the brief) for petitioner; PATRICIA J. BARRY, Grover City, Calif. (CATHARINE A. MacKINNON, with her on the brief) for respondents.

APPENDIX B

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION GUIDELINES

29 C.F.R. § 1604.11

PART 1604—GUIDELINES ON DISCRIMINATION BECAUSE OF SEX

§ 1604.11 Sexual harassment.

(a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII.[1] Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

(b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

(c) Applying general Title VII principles, an employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as " employer") is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

(d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

(e) An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

(f) Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

(g) Other related practices: Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but were denied that employment opportunity or benefit.

[1] The principles involved here continue to apply to race, color, religion or national origin.

This appendix reproduces an EEOC Notice Verbatim.

APPENDIX C

EEOC Notice
Policy Guidance on Current Issues of Sexual Harassment

EEOC NOTICE Number N-915-050 March 19, 1990

1. SUBJECT: Policy Guidance on Current Issues of Sexual Harassment.

2. EFFECTIVE DATE: Upon receipt.

3. EXPIRATION DATE: As an exception to EEOC Order 295.001, Appendix B, Attachment 4, a(5), this notice will remain in effect until rescinded or superseded.

4. SUBJECT MATTER:

This document provides guidance on defining sexual harassment and establishing employer liability in light of recent cases.

Section 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a) provides:

> It shall be an unlawful employment practice for an employer —
>
> . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]

In 1980 the Commission issued guidelines declaring sexual harassment a violation of Section 703 of Title VII, establishing criteria for determining when unwelcome conduct of a sexual nature constitutes sexual harassment, defining the circumstances under which an employer may be held liable, and suggesting affirmative steps an employer should take to prevent sexual harassment. *See* Section 1604.11 of the Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 ("Guidelines"). The Commission has applied the Guidelines in its enforcement litigation, and many lower courts have relied on the Guidelines.

The issue of whether sexual harassment violates Title VII reached the Supreme Court in 1986 in *Meritor Savings Bank v. Vinson*, 106 S. Ct. 2399, 40 EPD ¶ 36,159 (1986). The Court affirmed the basic premises of the Guidelines as well as the Commission's definition. The purpose of this document is to provide guidance on the following issues in light of the developing law after *Vinson*:

- determining whether sexual conduct is "unwelcome";
- evaluating evidence of harassment;
- determining whether a work environment is sexually "hostile";
- holding employers liable for sexual harassment bysupervisors; and
- evaluating preventive and remedial action taken in response to claims of sexual harassment.

BACKGROUND

A. Definition

Title VII does not proscribe all conduct of a sexual nature in the workplace. Thus it is crucial to clearly define sexual harassment: only unwelcome sexual conduct that is a term or condition of employment constitutes a violation. 29 C. F. R. § 1604.11(a). The EEOC's Guidelines define two types of sexual harassment: *quid pro quo* and "hostile environment." The Guidelines provide that "unwelcome" sexual conduct constitutes sexual harassment when "submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment," 29 C.F.R. § 1604.11(a)(1). *quid pro quo* harassment occurs when "submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual," 29 C.F.R. § 1604.11(a)(2).[1] The EEOC's Guidelines also recognize that unwelcome sexual conduct that "unreasonably interfer[es] with an individual's job performance" or creates an "intimidating, hostile, or offensive working environment" can constitute sex discrimination, even if it leads to no tangible or economic job consequences. 29 C.F.R. § 1604.11(a)(3).[2] The Supreme Court's decision in *Vinson* established that both types of sexual harassment are actionable under section 703 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e 2(a), as forms of sex discrimination.

Although *quid pro quo* and "hostile environment" harassment are theoretically distinct claims, the line between the two is not always clear and the two forms of harassment often occur together. For example, an employee's tangible job conditions are affected when a sexually hostile work environment results in her constructive discharge.[3] Similarly, a supervisor who makes sexual advances toward a subordinate employee may communicate an implicit threat to adversely affect her job status if she does not comply. "Hostile environment" harassment may acquire characteristics of *quid pro quo* harassment if the offending supervisor abuses

his authority over employment decisions to force the victim to endure or participate in the sexual conduct. Sexual harassment may culminate in a retaliatory discharge if a victim tells the harasser or her employer she will no longer submit to the harassment, and is then fired in retaliation for this protest. Under these circumstances it would be appropriate to conclude that both harassment and retaliation in violation of section 704(a) of Title VII have occurred.

Distinguishing between the two types of harassment is necessary when determining the employer's liability (*see infra* Section D). But while categorizing sexual harassment as *quid pro quo*, "hostile environment," or both is useful analytically these distinctions should not limit the Commission's investigations,[4] which generally should consider all available evidence and testimony under all possibly applicable theories.

B. Supreme Court's Decision in Vinson

Meritor Savings Bank v. Vinson posed three questions for the Supreme Court:

(1) Does unwelcome sexual behavior that creates a hostile working environment constitute employment discrimination on the basis of sex;

(2) Can a Title VII violation be shown when the district court found that any sexual relationship that existed between the plaintiff and her supervisor was a "voluntary one"; and

(3) Is an employer strictly liable for an offensive working environment created by a supervisor's sexual advances when the employer does not know of, and could not reasonably have known of, the supervisor's misconduct.

1) Facts - The plaintiff had alleged that her supervisor constantly subjected her to sexual harassment both during and after business hours, on and off the employer's premises; she alleged that he forced her to have sexual intercourse with him on numerous occasions, fondled her in front of other employees, followed her into the women's restroom and exposed himself to her, and even raped her on several occasions. She alleged that she submitted for fear of jeopardizing her employment. She testified, however, that this conduct had ceased almost a year before she first complained in any way, by filing a Title VII suit; her EEOC charge was filed later (*see infra* at n.34). The supervisor and the employer denied all of her allegations and claimed they were fabricated in response to a work dispute.

2) Lower Courts' Decisions - After trial, the district court found the plaintiff was not the victim of sexual harassment and was not required to grant sexual favors as a condition of employment or promotion. *Vinson v. Taylor*, 22 EPD ¶ 30,708 (D.D.C. 1980). Without resolving the conflicting testimony, the district court found that if a sexual relationship had existed between plaintiff and her supervisor, it was "a voluntary one . . . having nothing to do with her continued employment." The district court nonetheless went on to hold that the employer was not liable for its supervisor's actions because it had no notice of the alleged sexual harassment; although the employer had a policy against discrimination and an internal grievance procedure, the plaintiff had never lodged a complaint.

The court of appeals reversed and remanded, holding the lower court should have considered whether the evidence established a violation under the "hostile environment" theory. *Vinson v. Taylor*, 753 F.2d 141, 36 EPD ¶ 34,949, *denial of rehearing en banc*, 760 F.2d1330, 37 EPD ¶ 35,232 (D.C. Cir. 1985). The court ruled that a victim's "voluntary" submission to sexual advances has "no materiality whatsoever" to the proper inquiry: whether "toleration of sexual harassment [was] a condition of her employment." The court further held that an employer is absolutely liable for sexual harassment committed by a supervisory employee, regardless of whether the employer actually knew or reasonably could have known of the misconduct, or would have disapproved of and stopped the misconduct if aware of it.

3) Supreme Court's Opinion - The Supreme Court agreed that the case should be remanded for consideration under the "hostile environment" theory and held that the proper inquiry focuses on the "unwelcomeness" of the conduct rather than the "voluntariness" of the victim's participation. But the Court held that the court of appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisory employees.

a) "Hostile Environment" Violates Title VII - The Court rejected the employer's contention that Title VII prohibits only discrimination that causes "economic" or "tangible" injury: "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult" whether based on sex, race, religion, or national origin. 106 S. Ct. at 2405. Relying on the EEOC's Guidelines' definition of harassment, the Court held that a plaintiff may establish a violation of Title VII "by proving that discrimination based on sex has created a hostile or abusive work environment." *Id.* The Court quoted the Eleventh Circuit's decision in *Henson v. City of Dundee*, 682 F.2d 897, 902, 29 EPD ¶ 32,993 (11th Cir. 1982):

> Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.

106 S. Ct. at 2406. The Court further held that for harassment to violate Title VII, it must be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Id.* (quoting *Henson*, 682 F.2d at 904).

b) Conduct Must Be "Unwelcome" - Citing the EEOC's Guidelines, the Court said the gravamen of a sexual harassment claim is that the alleged sexual advances were

"unwelcome." 106 S. Ct. at 2406. Therefore, "the fact that sex-related conduct was `voluntary,' in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII .... The correct inquiry is whether [the victim] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary." *Id.* Evidence of a complainant's sexually provocative speech or dress may be relevant in determining whether she found particular advances unwelcome, but should be admitted with caution in light of the potential for unfair prejudice, the Court held.

c) **Employer Liability Established Under Agency Principles** - On the question of employer liability in "hostile environment" cases, the Court agreed with EEOC's position that agency principles should be used for guidance. While declining to issue a "definitive rule on employer liability," the Court did reject both the court of appeals' rule of automatic liability for the actions of supervisors and the employer's position that notice is always required. 106 S. Ct. at 2408-09.

The following sections of this document provide guidance on the issues addressed in *Vinson* and subsequent cases.

GUIDANCE

A. Determining Whether Sexual Conduct Is Unwelcome

Sexual harassment is "unwelcome ... verbal or physical conduct of a sexual nature .... 29 C.F.R. § 1604.11(a). Because sexual attraction may often play a role in the day-to-day social exchange between employees, "the distinction between invited, uninvited but-welcome, offensive-but tolerated, and flatly rejected" sexual advances may well be difficult to discern. *Barnes v. Costle*, 561 F.2d 983, 999, 14 EPD ¶ 7755 (D.C. Cir. 1977) (MacKinnon J., concurring). But this distinction is essential because sexual conduct becomes unlawful only when it is unwelcome. The Eleventh Circuit provided a general definition of "unwelcome conduct" in *Henson v. City of Dundee*, 682 F.2d at 903: the challenged conduct must be unwelcome "in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive."

When confronted with conflicting evidence as to welcomeness, the Commission looks "at the record as a whole and at the totality of circumstances ...." 29 C.F.R. § 1604.11(b), evaluating each situation on a case-by-case basis. When there is some indication of welcomeness or when the credibility of the parties is at issue, the charging party's claim will be considerably strengthened if she made a contemporaneous complaint or protest.[7] Particularly when the alleged harasser may have some reason (e.g., a prior consensual relationship) to believe that the advances will be welcomed, it is important for the victim to communicate that the conduct is unwelcome. Generally, victims are well-advised to assert their right to a workplace free from sexual harassment. This may stop the harassment before it becomes more serious. A contemporaneous complaint or protest may also provide persuasive evidence that the sexual harassment in fact occurred as alleged (*see infra* Section B). Thus, in investigating sexual harassment charges, it is important to develop detailed evidence of the circumstances and nature of any such complaints or protests, whether to the alleged harasser, higher management, co-workers or others.[8]

While a complaint or protest is helpful to charging party's case, it is not a necessary element of the claim. Indeed, the Commission recognizes that victims may fear repercussions from complaining about the harassment and that such fear may explain a delay in opposing the conduct. If the victim failed to complain or delayed in complaining, the investigation must ascertain why. The relevance of whether the victim has complained varies depending upon "the nature of the sexual advances and the context in which the alleged incidents occurred." 29 C.F.R. § 1604.11(b).[9]

> Example - Charging Party (CP) alleges that her supervisor subjected her to unwelcome sexual advances that created a hostile work environment. The investigation into her charge discloses that her supervisor began making intermittent sexual advances to her in June, 1987, but she did not complain to management about the harassment. After the harassment continued and worsened, she filed a charge with EEOC in June, 1988. There is no evidence CP welcomed the advances. CP states that she feared that complaining about the harassment would cause her to lose her job. She also states that she initially believed she could resolve the situation herself, but as the harassment became more frequent and severe, she said she realized that intervention by EEOC was necessary. The investigator determines CP is credible and concludes that the delay in complaining does not undercut CP's claim.

When welcomeness is at issue, the investigation should determine whether the victim's conduct is consistent, or inconsistent, with her assertion that the sexual conduct is unwelcome.[10]

In *Vinson*, the Supreme Court made clear that voluntary submission to sexual conduct will not necessarily defeat a claim of sexual harassment. The correct inquiry "is whether [the employee] *by her conduct* indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary." 106 S. Ct. at 2406 (emphasis added). *See also* Commission Decision No. 84-1 ("acquiescence in sexual conduct at the workplace may not mean that the conduct is welcome to the individual").

In some cases the courts and the Commission have considered whether the complainant welcomed the sexual conduct by acting in a sexually aggressive manner, using sexually oriented language, or soliciting the sexual conduct. Thus, in *Gan v. Kepro Circuit Systems*, 27 EPD § 32,379 (E.D. Mo. 1982), the plaintiff regularly used vulgar language, initiated sexually-oriented conversations with her co-workers, asked male employees about their marital sex lives and whether they engaged in extramarital affairs, and discussed her own sexual encounters. In rejecting the plaintiff's claim of "hostile environment" harassment, the court found that any propositions or sexual remarks by co-workers were "prompted by her own sexual aggressiveness and her own

sexually-explicit conversations" *Id.* at 23,648.[11] And in *Vinson*, the Supreme Court held that testimony about the plaintiff's provocative dress and publicly expressed sexual fantasies is not *per se* inadmissible but the trial court should carefully weigh its relevance against the potential for unfair prejudice. 106 S. Ct. at 2407.

Conversely, occasional use of sexually explicit language does not necessarily negate a claim that sexual conduct was unwelcome. Although a charging party's use of sexual terms or off-color jokes may suggest that sexual comments by others in that situation were not unwelcome, more extreme and abusive or persistent comments or a physical assault will not be excused, nor would "quid pro quo" harassment be allowed.

Any past conduct of the charging party that is offered to show "welcomeness" must relate to the alleged harasser. In *Swentek v. USAir, Inc.*, 830 F.2d 552, 557, 44 EPD ¶ 37,457 (4th Cir. 1987), the Fourth Circuit held the district court wrongly concluded that the plaintiff's own past conduct and use of foul language showed that "she was the kind of person who could not be offended by such comments and therefore welcomed them generally," even though she had told the harasser to leave her alone. Emphasizing that the proper inquiry is "whether plaintiff welcomed the particular conduct in question from the alleged harasser," the court of appeals held that "Plaintiff's use of foul language or sexual innuendo in a consensual setting does not waive her legal protections against unwelcome harassment.'" 830 F.2d at 557 (quoting *Katz v. Dole*, 709 F.2d 251, 254 n.3, 32 EPD ¶ 33,639 (4th Cir. 1983)). Thus, evidence concerning a charging party's general character and past behavior toward others has limited, if any, probative value and does not substitute for a careful examination of her behavior toward the alleged harasser.

A more difficult situation occurs when an employee first willingly participates in conduct of a sexual nature but then ceases to participate and claims that any continued sexual conduct has created a hostile work environment. Here the employee has the burden of showing that any further sexual conduct is unwelcome, work-related harassment. The employee must clearly notify the alleged harasser that his conduct is no longer welcome.[12] If the conduct still continues, her failure to bring the matter to the attention of higher management or the EEOC is evidence, though not dispositive, that any continued conduct is, in fact, welcome or unrelated to work.[13] In any case, however, her refusal to submit to the sexual conduct cannot be the basis for denying her an employment benefit or opportunity; that would constitute a "quid pro quo" violation.

B. Evaluating Evidence of Harassment

The Commission recognizes that sexual conduct may be private and unacknowledged, with no eyewitnesses. Even sexual conduct that occurs openly in the workplace may appear to be consensual. Thus the resolution of a sexual harassment claim often depends on the credibility of the parties. The investigator should question the charging party and the alleged harasser in detail. The Commission's investigation also should search thoroughly for corroborative evidence of any nature.[14] Supervisory and managerial employees, as well as co-workers, should be asked about their knowledge of the alleged harassment.

In appropriate cases, the Commission may make a finding of harassment based solely on the credibility of the victim's allegation. As with any other charge of discrimination, a victim's account must be sufficiently detailed and internally consistent so as to be plausible, and lack of corroborative evidence where such evidence logically should exist would undermine the allegation.[15] By the same token, a general denial by the alleged harasser will carry little weight when it is contradicted by other evidence.[16]

Of course, the Commission recognizes that a charging party may not be able to identify witnesses to the alleged conduct itself. But testimony may be obtained from persons who observed the charging party's demeanor immediately after an alleged incident of harassment. Persons with whom she discussed the incident — such as co-workers, a doctor or a counselor — should be interviewed. Other employees should be asked if they noticed changes in charging party's behavior at work or in the alleged harasser's treatment of charging party. As stated earlier, a contemporaneous complaint by the victim would be persuasive evidence both that the conduct occurred and that it was unwelcome (*see supra* Section A). So too is evidence that other employees were sexually harassed by the same person.

The investigator should determine whether the employer was aware of any other instances of harassment and if so what was the response. Where appropriate the Commission will expand the case to include class claims.[17]

> Example - Charging Party (CP) alleges that her supervisor made unwelcome sexual advances toward her on frequent occasions while they were alone in his office. The supervisor denies this allegation. No one witnessed the alleged advances. CP's inability to produce eyewitnesses to the harassment does *not* defeat her claim. The resolution will depend on the credibility of her allegations versus that of her supervisor's. Corroborating, credible evidence will establish her claim. For example, three co-workers state that CP looked distraught on several occasions after leaving the supervisor's office, and that she informed them on those occasions that he had sexually propositioned and touched her. In addition, the evidence shows that CP had complained to the general manager of the office about the incidents soon after they occurred. The corroborating witness testimony and her complaint to higher management would be sufficient to establish her claim. Her allegations would be further buttressed if other employees testified that the supervisor propositioned them as well.

If the investigation exhausts all possibilities for obtaining corroborative evidence, but finds none, the Commission may make a cause finding based solely on a reasoned decision to credit the charging party's testimony.[18]

In a *quid pro quo* case, a finding that the employer's asserted reasons for its adverse action against the charging

party are pretextual will usually establish a violation. The investigation should determine the validity of the employer's reasons for the charging party's termination. If they are pretextual and if the sexual harassment occurred, then it should be inferred that the charging party was terminated for rejecting the employer's sexual advances, as she claims. Moreover, if the termination occurred because the victim complained, it would be appropriate to find, in addition, a violation of section 704(a).

C. Determining Whether A Work Environment is "Hostile"

The Supreme Court said in *Vinson* that for sexual harassment to violate Title VII, it must be "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment.'" 106 S. Ct. at 2406 (quoting *Henson v. City of Dundee*, 682 F.2d at 904). Since "hostile environment" harassment takes a variety of forms, many factors may affect this determination, including: (1) whether the conduct was verbal or physical, or both; (2) how frequently it was repeated; (3) whether the conduct was hostile and patently offensive; (4) whether the alleged harasser was a co-worker or a supervisor; (5) whether others joined in perpetrating the harassment; and (6) whether the harassment was directed at more than one individual.

In determining whether unwelcome sexual conduct rises to the level of a "hostile environment" in violation of Title VII, the central inquiry is whether the conduct "unreasonably interfer[es] with an individual's work performance" or creates "an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11(a)(3). Thus, sexual flirtation or innuendo, even vulgar language that is trivial or merely annoying, would probably not establish a hostile environment.

1) Standard for Evaluating Harassment - In determining whether harassment is sufficiently severe or pervasive to create a hostile environment, the harasser's conduct should be evaluated from the objective standpoint of a "reasonable person." Title VII does not serve "as a vehicle for vindicating the petty slights suffered by the hypersensitive." *Zabkowicz v. West Bend Co.*, 589 F. Supp. 780, 784, 35 EPD ¶ 34,766 (E.D. Wis. 1984). *See also Ross v. Comsat*, 34 FEP cases 260, 265 (D. Md. 1984), *rev'd on other grounds*, 759 F.2d 355 (4th Cir. 1985). Thus, if the challenged conduct would not substantially affect the work environment of a reasonable person, no violation should be found.

> Example - Charging Party alleges that her co-worker made repeated unwelcome sexual advances toward her. An investigation discloses that the alleged "advances" consisted of invitations to join a group of employees who regularly socialized at dinner after work. The co-worker's invitations, viewed in that context and from the perspective of a reasonable person, would not have created a hostile environment and therefore did not constitute sexual harassment.

A "reasonable person" standard also should be applied to the more basic determination of whether challenged conduct is of a sexual nature. Thus, in the above example, a reasonable person would not consider the co-worker's invitations sexual in nature, and on that basis as well no violation would be found.

This objective standard should not be applied in a vacuum, however. Consideration should be given to the context in which the alleged harassment took place. As the Sixth Circuit has stated, the trier of fact must "adopt the perspective of a reasonable person's reaction to a similar environment under similar or like circumstances." *Highlander v. K.F.C. National Management Co.*, 805 F.2d 644, 650, 41 EPD ¶ 36,675 (6th Cir. 1986).[20]

The reasonable person standard should consider the victim's perspective and not stereotyped notions of acceptable behavior. For example, the Commission believes that a workplace in which sexual slurs, displays of "girlie" pictures, and other offensive conduct abound can constitute a hostile work environment even if many people deem it to be harmless or insignificant. *Cf. Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 626, 41 EPD 36,643 (6th Cir. 1986) (Keith, C.J., dissenting), *cert. denied*, 107 S. Ct. 1983, 42 EPD ¶ 36,984 (1987). *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 898 48 EPD ¶ 38,393 (1st Cir. 1988).

2) Isolated Instances of Harassment - Unless the conduct is quite severe, a single incident or isolated incidents of offensive sexual conduct or remarks generally do not create an abusive environment. As the Court noted in *Vinson*, "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee would not affect the conditions of employment to a sufficiently significant degree to violate Title VII." 106 S. Ct. at 2406 (quoting *Rogers v. EEOC*, 454 F.2d. 234, 4 EPD ¶ 7597 (5th Cir. 1971), *cert. denied*, 406 U.S. 957, 4 EPD ¶ 7838 (1972)). A "hostile environment" claim generally requires a showing of a pattern of offensive conduct.[21] In contrast, in *quid pro quo* cases a single sexual advance may constitute harassment if it is linked to the granting or denial of employment benefits.[22]

But a single, unusually severe incident of harassment may be sufficient to constitute a Title VII violation; the more severe the harassment, the less need to show a repetitive series of incidents. This is particularly true when the harassment is physical.[23] Thus, in *Barrett v. Omaha National Bank*, 584 F. Supp. 22, 35 FEP Cases 585 (D. Neb. 1983), *aff'd*, 726 F.2d 424, 33 EPD ¶ 34,132 (8th Cir. 1984), one incident constituted actionable sexual harassment. The harasser talked to the plaintiff about sexual activities and touched her in an offensive manner while they were inside a vehicle from which she could not escape.[24]

The Commission will presume that the unwelcome, intentional touching of a charging party's intimate body areas is sufficiently offensive to alter the conditions of her working environment and constitute a violation of Title VII. More so than in the case of verbal advances or remarks, a single unwelcome physical advance can seriously poison the victim's working environment. If an employee's supervisor sexually touches that employee, the Commission normally

would find a violation. In such situations, it is the employer's burden to demonstrate that the unwelcome conduct was not sufficiently severe to create a hostile work environment.

When the victim is the target of both verbal and non-intimate physical conduct, the hostility of the environment is exacerbated and a violation is more likely to be found. Similarly, incidents of sexual harassment directed at other employees in addition to the charging party are relevant to a showing of hostile work environment. *Hall v. Gus Construction Co.*, 842 F.2d 1010, 46 EPD ¶ 37,905 (8th Cir. 1988); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 44 EPD ¶ 37,542 (10th Cir. 1987); *Jones v. Flagship International*, 793 F.2d 714, 721 n.7, 40 EPD ¶ 36,392 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 952, 41 EPD ¶ 36,708 (1987).

3) Non-physical Harassment - When the alleged harassment consists of verbal conduct, the investigation should ascertain the nature, frequency, context, and intended target of the remarks. Questions to be explored might include:

- Did the alleged harasser single out the charging party?
- Did the charging party participate?
- What was the relationship between the charging party and the alleged harasser(s)?
- Were the remarks hostile and derogatory?

No one factor alone determines whether particular conduct violates Title VII. As the Guidelines emphasize, the Commission will evaluate the totality of the circumstances. In general, a woman does not forfeit her right to be free from sexual harassment by choosing to work in an atmosphere that has traditionally included vulgar, anti-female language. However, *in Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 41 EPD ¶ 36,643 (6th Cir. 1986), *cert. denied*, 107 S. Ct. 1983, 42 EPD ¶ 36,984 (1987), the Sixth Circuit rejected the plaintiff's claim of harassment in such a situation.[25] One of the factors the court found relevant was "the lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff's introduction into its environs, coupled with the reasonable expectations of the plaintiff upon voluntarily entering that environment." 805 F.2d at 620. Quoting the district court, the majority noted that in some work environments, "'humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations, and girlie magazines may abound. Title VII was not meant to — or can — change this.'" *Id.* at 620-21. The court also considered the sexual remarks and poster at issue to have a *de minimis* effect on the plaintiff's work environment when considered in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica at the newsstands, on prime-time television, at the cinema, and in other public places." *Id.* at 622.

The Commission believes these factors rarely will be relevant and agrees with the dissent in *Rabidue* that a woman does not assume the risk of harassment by voluntarily entering an abusive, anti-female environment. "Title VII's precise purpose is to prevent such behavior and attitudes from poisoning the work environment of classes protected under the Act." 805 F.2d at 626 (Keith, J., dissenting in part and concurring in part). Thus, in a decision disagreeing with *Rabidue*, a district court found that a hostile environment was established by the presence of pornographic magazines in the workplace and vulgar employee comments concerning them; offensive sexual comments made to and about plaintiff and other female employees by her supervisor; sexually oriented pictures in a company-sponsored movie and slide presentation; sexually oriented pictures and calendars in the workplace; and offensive touching of plaintiff by a co-worker. *Barbetta v. Chemlawn Services Corp.*, 669 F. Supp. 569, 45 EPD ¶ 37,568 (W.D.N.Y. 1987). The court held that the proliferation of pornography and demeaning comments, if sufficiently continuous and pervasive, "may be found to create an atmosphere in which women are viewed as men's sexual playthings rather than as their equal coworkers." *Barbetta*, 669 F. Supp. at 573. The Commission agrees that, depending on the totality of circumstances, such an atmosphere may violate Title VII. *See also Waltman v. International Paper Co.*, 875 F.2d 468, 50 EPD ¶ 39,106 (5th Cir. 1989), in which the 5th Circuit endorsed the Commission's position in its *amicus* brief that evidence of ongoing sexual graffiti in the workplace, not all of which was directed at the plaintiff, was relevant to her claim of harassment. *Bennett v. Corroon & Black Corp.*, 845 F.2d 104, 46 EPD ¶ 37,955 (5th Cir. 1988) (the posting of obscene cartoons in an office men's room bearing the plaintiff's name and depicting her engaged in crude and deviant sexual activities could create a hostile work environment).

4) Sex-based Harassment - Although the Guidelines specifically address conduct that is sexual in nature, the Commission notes that sex-based harassment — that is, harassment not involving sexual activity or language — may also give rise to Title VII liability (just as in the case of harassment based on race, national origin or religion) if it is "sufficiently patterned or pervasive" and directed at employees because of their sex. *Hicks v. Gates Rubber Co.*, 833 F.2d at 1416; *McKinney v. Dole*, 765 F.2d 1129, 1138, 37 EPD ¶ 35,339 (D.C. Cir. 1985).

Acts of physical aggression, intimidation, hostility or unequal treatment based on sex may be combined with incidents of sexual harassment to establish the existence of discriminatory terms and conditions of employment. *Hall v. Gus Construction Co.*, 842 F.2d at 1014; *Hicks v. Gates Rubber Co.*, 833 F.2d at 1416.

5) Constructive Discharge - Claims of "hostile environment" sexual harassment often are coupled with claims of constructive discharge. If constructive discharge due to a hostile environment is proven, the claim will also become one of *quid pro quo* harassment.[26] It is the position of the Commission and a majority of courts that an employer is liable for constructive discharge when it imposes intolerable working conditions in violation of Title VII when those conditions foreseeably would compel a reasonable employee to quit, whether or not the employer specifically intended to force the victim's resignation. *See Derr v. Gulf Oil Corp.*, 796 F.2d 340, 343-44, 41 EPD ¶ 36,468 (10th Cir. 1986); *Goss v. Exxon Office Systems Co.*, 747 F.2d 885, 888, 35 EPD ¶ 34,768 (3d Cir. 1984); *Nolan v. Cleland*, 686 F.2d 806, 812-15, 30 EPD ¶

33,029 (9th Cir. 1982); *Held v. Gulf Oil Co.*, 684 F.2d 427, 432, 29 EPD ¶ 32,968 (6th Cir. 1982); *Clark v. Marsh*, 665 F.2d 1168, 1175 n.8, 26 EPD ¶ 32,082 (D.C. Cir. 1981); *Bourque v. Powell Electrical Manufacturing Co.*, 617 F.2d 61, 65, 23 EPD ¶ 30,891 (5th Cir. 1980); Commission Decision 84-1, CCH EEOC Decision ¶ 6839. However, the Fourth Circuit requires proof that the employer imposed the intolerable conditions with the intent of forcing the victim to leave. *See EEOC v. Federal Reserve Bank of Richmond*, 698 F.2d 633, 672, 30 EPD ¶ 33,269 (4th Cir. 1983). But this case is not a sexual harassment case and the Commission believes it is distinguishable because specific intent is not as likely to be present in "hostile environment" cases.

An important factor to consider is whether the employer had an effective internal grievance procedure. (*See* Section E, *Preventive and Remedial Action*). The Commission argued in its *Vinson* brief that if an employee knows that effective avenues of complaint and redress are available, then the availability of such avenues itself becomes a part of the work environment and overcomes, to the degree it is effective, the hostility of the work environment. As Justice Marshall noted in his opinion in *Vinson*, "Where a complainant without good reason bypassed an internal complaint procedure she knew to be effective, a court may be reluctant to find constructive termination . . . ." 106 S. Ct. at 2411 (Marshall, J., concurring in part and dissenting in part). Similarly, the court of appeals in *Dornhecker v. Malibu Grand Prix Corp.*, 828 F.2d 307, 44 EPD ¶ 37,557 (5th Cir. 1987), held the plaintiff was not constructively discharged after an incident of harassment by a co-worker because she quit immediately, even though the employer told her she would not have to work with him again, and she did not give the employer a fair opportunity to demonstrate it could curb the harasser's conduct.

D. Employer Liability for Harassment by Supervisors

In *Vinson*, the Supreme Court agreed with the Commission's position that "Congress wanted courts to look to agency principles for guidance" in determining an employer's liability for sexual conduct by a supervisor:

> While such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer, 42 U.S.C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible.

106 S. Ct. at 2408. Thus, while declining to issue a "definitive rule on employer liability," the Court did make it clear that employers are not "automatically liable" for the acts of their supervisors. For the same reason, the Court said, "absence of notice to an employer does not necessarily insulate that employer from liability." *Id.*

As the Commission argued in *Vinson*, reliance on agency principles is consistent with the Commission's Guidelines, which provide in section 1604.11(c) that:

> . . . an employer . . . is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

Citing the last sentence of this provision, the Court in *Vinson* indicated that the Guidelines further supported the application of agency principles. 106 S. Ct. at 2408.

1) Application of Agency Principles - *Quid Pro Quo* Cases - An employer will always be held responsible for acts of *quid pro quo* harassment. A supervisor in such circumstances has made or threatened to make a decision affecting the victim's employment status, and he therefore has exercised authority delegated to him by his employer. Although the question of employer liability for *quid pro quo* harassment was not at issue in *Vinson*, the Court's decision noted with apparent approval the position taken by the Commission in its brief that:

> where a supervisor exercises the authority actually delegated to him by his employer, by making or threatening to make decisions affecting the employment status of his subordinates, such actions are properly imputed to the employer whose delegation of authority empowered the supervisor to undertake them.

106 S. Ct. at 2407-08 (citing Brief for the United States and Equal Employment Opportunity Commission as *Amicus Curiae* at 22).[27] *See also Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 44 EPD ¶ 37,493 (11th Cir. 1987) (adopting EEOC position quoted in *Vinson* opinion); *Lipsett*, 864 F.2d at 901 (adopting, for Title IX of the Education Amendments, the *Vinson* standard that an employer is absolutely liable for acts of *quid pro quo* harassment "whether [it] knew, should have known, or approved of the supervisor's actions"). Thus, applying agency principles, the court in *Schroeder v. Schock*, 42 FEP Cases 1112 (D. Kans. 1986), held an employer liable for *quid pro quo* harassment by a supervisor who had authority to recommend plaintiff's discharge. The employer maintained the supervisor's acts were beyond the scope of his employment since the sexual advances were made at a restaurant after work hours. The court held that because the supervisor was acting within the scope of his authority when making or recommending employment decisions, his conduct may fairly be imputed to the employer. The supervisor was using his authority to hire, fire, and promote to extort sexual consideration from an employee, even though the sexual advance itself occurred away from work.

2) Application of Agency Principles - "Hostile Environment" Cases

a) *Vinson* - In its *Vinson* brief the Commission argued that the employer should be liable for the creation of a hostile

environment by a supervisor when the employer knew or had reason to know of the sexual misconduct. Ways by which actual or constructive knowledge could be demonstrated include: by a complaint to management or an EEOC charge; by the pervasiveness of the harassment; or by evidence the employer had "deliberately turned its back on the problem" of sexual harassment by failing to establish a policy against it and a grievance mechanism to redress it. The brief argued that an employer should be liable "if there is no reasonably available avenue by which victims of sexual harassment can make their complaints known to appropriate officials who are in a position to do something about those complaints." Brief for the United States and Equal Employment Opportunity Commission as *Amicus Curiae* at 25. Under that circumstance, an employer would be deemed to know of any harassment that occurred in its workplace.

While the *Vinson* decision quoted the Commission's brief at length, it neither endorsed nor rejected its position.[28] 106 S. Ct. at 2407-08. The Court did state, however, that "the mere existence of a grievance procedure and a policy against discrimination, coupled with [the victim's] failure to invoke the procedure" are "plainly relevant" but "not necessarily dispositive." *Id.* at 2408-09. The Court further stated that the employer's argument that the victim's failure to complain insulated it from liability "might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward." *Id.* at 2409.

The Commission, therefore, interprets *Vinson* to require a careful examination in "hostile environment" cases of whether the harassing supervisor was acting in an "agency capacity" (29 C.F.R. ¶ 1604.11(c)). Whether the employer had an appropriate and effective complaint procedure and whether the victim used it are important factors to consider, as discussed below.

b) Direct Liability - The initial inquiry should be whether the employer knew or should have known of the alleged sexual harassment. If actual or constructive knowledge exists, and if the employer failed to take immediate and appropriate corrective action, the employer would be directly liable.[29] Most commonly an employer acquires actual knowledge through first-hand observation, by the victim's internal complaint to other supervisors or managers, or by a charge of discrimination.

An employer is liable when it "knew, or *upon reasonably diligent inquiry should have known*," of the harassment. *Yates v. Avco Corp.*, 819 F.2d 630, 636, 43 EPD ¶ 37,086 (6th Cir. 1987) (emphasis added) (supervisor harassed two women "on a daily basis in the course of his supervision of them" and the employer's grievance procedure did not function effectively). Thus, evidence of the pervasiveness of the harassment may give rise to an inference of knowledge or establish constructive knowledge. *Henson v. City of Dundee*, 682 F.2d 897, 905, 29 EPD ¶ 32,993 (11th Cir. 1982); *Taylor v. Jones*, 653 F.2d 1193, 1197-99, 26 EPD ¶ 31,923 (8th Cir. 1981). Employers usually will be deemed to know of sexual harassment that is openly practiced in the workplace or well-known among employees. This often may be the case when there is more than one harasser or victim. *Lipsett*, 864 F.2d at 906 (employer liable where it should have known of concerted harassment of plaintiff and other female medical residents by more senior male residents).

The victim can of course put the employer on notice by filing a charge of discrimination. As the Commission stated in its *Vinson* brief, the filing of a charge triggers a duty to investigate and remedy any ongoing illegal activity. It is important to emphasize that an employee can always file an EEOC charge without first utilizing an internal complaint or grievance procedure[30] and may wish to pursue both avenues simultaneously because an internal grievance does not prevent the Title VII charge filing time period from expiring.[31] Nor does the filing of an EEOC charge allow an employer to cease action on an internal grievance[32] or ignore evidence of ongoing harassment.[33] Indeed, employers should take prompt remedial action upon learning of evidence of sexual harassment (or any other form of unlawful discrimination), whether from an EEOC charge or an internal complaint. If the employer takes immediate and appropriate action to correct the harassment and prevent its recurrence, and the Commission determines that no further action is warranted, normally the Commission would administratively close the case.

c) Imputed Liability - The investigation should determine whether the alleged harassing supervisor was acting in an "agency capacity" (29 C.F.R. § 1604.11(c)).[34] This requires a determination whether the supervisor was acting within the scope of his employment (*see* Restatement (Second) of Agency, § 219(1) (1958)), or whether his actions can be imputed to the employer under some exception to the "scope of employment" rule (*Id.* at § 219(2)). The following principles should be considered, and applied where appropriate in "hostile environment" sexual harassment cases.

1. Scope of Employment - A supervisor's actions are generally viewed as being within the scope of his employment if they represent the exercise of authority actually vested in him. It will rarely be the case that an employer will have authorized a supervisor to engage in sexual harassment. *See Fields v. Horizon House, Inc.*, No. 86-4343 (E.D. Pa. 1987) (available on Lexis, Genfed library, Dist. file). *Cf. Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1421-22, 41 EPD ¶ 36,417 (7th Cir. 1986) (co-worker racial harassment case). However, if the employer becomes aware of work-related sexual misconduct and does nothing to stop it, the employer, by acquiescing, has brought the supervisor's actions within the scope of his employment.

2. Apparent Authority - An employer is also liable for a supervisor's actions if these actions represent the exercise of authority that third parties reasonably believe him to possess by virtue of his employer's conduct. This is called "apparent authority." *See* Restatement (Second) of Agency, §§ 7, 8; 219(2)(d) (1958). The Commission believes that in the absence of a strong, widely disseminated, and consistently enforced employer policy against sexual harassment, and an effective complaint procedure, employees could reasonably believe that a harassing supervisor's actions will be ignored, tolerated, or even condoned by upper management. This apparent authority of supervisors arises from their power over their employees, including the power to make or substantially influence hiring, firing, promotion and compensation decisions. A supervisor's capacity to create a hostile environment is enhanced by the degree of authority conferred on him by the employer, and he may rely upon appar-

ent authority to force an employee to endure a harassing environment for fear of retaliation. If the employer has not provided an effective avenue to complain, then the supervisor has unchecked, final control over the victim and it is reasonable to impute his abuse of this power to the employer.[35] The Commission generally will find an employer liable for "hostile environment" sexual harassment by a supervisor when the employer failed to establish an explicit policy against sexual harassment and did not have a reasonably available avenue by which victims of sexual harassment could complain to someone with authority to investigate and remedy the problem. (*See* Section E.) *See also EEOC v. Hacienda Hotel*, 881 F.2d 1504, 51 EPD ¶ 39,250 (9th Cir. 1989) (finding employer liable for sexual harassment despite plaintiff's failure to pursue internal remedies where the employer's anti-discrimination policy did not specifically proscribe sexual harassment and its internal procedures required initial resort to the supervisor accused of engaging in or condoning harassment).

But an employer can divest its supervisors of this apparent authority by implementing a strong policy against sexual harassment and maintaining an effective complaint procedure. When employees know that recourse is available, they cannot reasonably believe that a harassing work environment is authorized or condoned by the employer.[37] If an employee failed to use an effective, available complaint procedure, the employer may be able to prove the absence of apparent authority and thus the lack of an agency relationship, unless liability attaches under some other theory.[37] Thus, even when an employee failed to use an effective grievance procedure, the employer will be liable if it obtained notice through other means (such as the filing of a charge or by the pervasiveness of the harassment) and did not take immediate and appropriate corrective action.

> Example - Charging Party (CP) alleges that her supervisor made repeated sexual advances toward her that created a hostile work environment. The investigation into her charge discloses that CP had maintained an intermittent romantic relationship with the supervisor over a period of three years preceding the filing of the charge in September of 1986. CP's employer was aware of this relationship and its consensual nature. CP asserts, however, that on frequent occasions since January of 1986 she had clearly stated to the supervisor that their relationship was over and his advances were no longer welcome. The supervisor nevertheless persisted in making sexual advances toward CP, berating her for refusing to resume their sexual relationship. His conduct did not put the employer on notice that any unwelcome harassment was occurring. The employer has a well-communicated policy against sexual harassment and a complaint procedure designed to facilitate the resolution of sexual harassment complaints and ensure against retaliation. This procedure has worked well in the past. CP did not use it, however, or otherwise complain to higher management. Even if CP's allegations are true, the Commission would probably not find her employer liable for the alleged harassment since she failed to use the complaint procedure or inform higher management that the advances had become unwelcome. If CP resigned because of the alleged harassment, she would not be able to establish a constructive discharge since she failed to complain.

In the preceding example, if the employer, upon obtaining notice of the charge, failed to take immediate and appropriate corrective action to stop any ongoing harassment, then the employer will be unable to prove that the supervisor lacked apparent authority for his conduct, and if the allegations of harassment are true, then the employer will be found liable. Or if the supervisor terminated the charging party because she refused to submit to his advances, the employer would be liable for *quid pro quo* harassment.

3. Other Theories - A closely related theory is agency by estoppel. *See* Restatement (Second) of Agency at § 8B. An employer is liable when he intentionally or carelessly causes an employee to mistakenly believe the supervisor is acting for the employer, or knows of the misapprehension and fails to correct it. For example, an employer who fails to respond appropriately to past known incidents of harassment would cause its employees to reasonably believe that any further incidents are authorized and will be tolerated.

Liability also may be imputed if the employer was "negligent or reckless" in supervising the alleged harasser. *See* Restatement (Second) of Agency § 219(2)(6); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1418, 44 EPD ¶ 37,542 (10th Cir. 1987). "Under this standard, liability would be imposed if the employer had actual or constructive knowledge of the sexual harassment but failed to take remedial action." *Fields v. Horizon House, Inc.*, No. 86-4343 (E.D. Pa. 1987). This is essentially the same as holding the employer directly liable for its failure to act.

An employer cannot avoid liability by delegating to another person a duty imposed by statute. Restatement (Second) of Agency at § 492 (1958), Introductory Note, p.435 ("liability follows if the person to whom the performance is delegated acts improperly with respect to it"). An employer who assigns the performance of a non-delegable duty to an employee remains liable for injuries resulting from the failure of the employee to carry out that duty. Restatement, §§ 214 and 219. Title VII imposes on employers a duty to provide their employees with a workplace free of sexual harassment. An employer who entrusts that duty to an employee is liable for injuries caused by the employee's breach of the duty. *See, e.g., Brooms v. Regal Tube Co.*, 44 FEP Cases 1119 (N.D. Ill. 1987) (employer liable for sexual harassment committed by the management official to whom it had delegated the responsibility to devise and enforce its policy against sexual harassment), *aff'd on other ground*, 881 F.2d 412, 420-21 (7th Cir. 1989).

Finally, an employer also may be liable if the supervisor "was aided in accomplishing the tort by the existence of the agency relation," Restatement (Second) of Agency § 219(2)(d). *See Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 44 EPD ¶ 37,493 (11th Cir. 1987); *Hicks v. Gates Rubber Co.*, 833 F.2d at 1418. For example, in *Sparks v. Pilot Freight Carriers*, the court

found that the supervisor had used his supervisory authority to facilitate his harassment of the plaintiff by "repeatedly reminding [her] that he could fire her should she fail to comply with his advances." 830 F.2d at 1560. This case illustrates how the two types of sexual harassment can merge. When a supervisor creates a hostile environment through the aid of work-related threats or intimidation, the employer is liable under both the *quid pro quo* and "hostile environment" theories.

E. Preventive and Remedial Action

1) Preventive Action - The EEOC's Guidelines encourage employers to:

> take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

29 C.F.R. § 604.11(f). An effective preventive program should include an explicit policy against sexual harassment that is clearly and regularly communicated to employees and effectively implemented. The employer should affirmatively raise the subject with all supervisory and non-supervisory employees, express strong disapproval, and explain the sanctions for harassment. The employer should also have a procedure for resolving sexual harassment complaints. The procedure should be designed to "encourage victims of harassment to come forward" and should not require a victim to complain first to the offending supervisor. *See Vinson*, 106 S. Ct. at 2408. It should ensure confidentiality as much as possible and provide effective remedies, including protection of victims and witnesses against retaliation.

2) Remedial Action - Since Title VII "affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult" (*Vinson*, 106 S. Ct. at 2405), an employer is liable for failing to remedy known hostile or offensive work environments. *See, e.g., Garziano v. E.I. DuPont deNemours & Co.*, 818 F.2d 380, 388, 43 EPD ¶ 37,171 (5th Cir. 1987) (*Vinson* holds employers have an "affirmative duty to eradicate 'hostile or offensive' work environments"); *Bundy v. Jackson*, 641 F.2d 934, 947, 24 EPD ¶ 31,439 (D.C. Cir. 1981) (employer violated Title VII by failing to investigate and correct sexual harassment despite notice); *Tompkins v. Public Service Electric & Gas Co.*, 568 F.2d 1044, 1049, 15 EPD 7954 (3d Cir. 1977) (same); *Henson v. City of Dundee*, 682 F.2d 897, 905, 15 EPD ¶ 32,993 (11th Cir. 1982) (same); *Munford v. James T. Barnes & Co.*, 441 F. Supp. 459, 466, 16 EPD ¶ 233 (E.D. Mich. 1977) (employer has an affirmative duty to investigate complaints of sexual harassment and to deal appropriately with the offending personnel; "failure to investigate gives tacit support to the discrimination because the absence of sanctions encourages abusive behavior").[38]

When an employer receives a complaint or otherwise learns of alleged sexual harassment in the workplace, the employer should investigate promptly and thoroughly. The employer should take immediate and appropriate corrective action by doing whatever is necessary to end the harassment, make the victim whole by restoring lost employment benefits or opportunities, and prevent the misconduct from recurring. Disciplinary action against the offending supervisor or employee, ranging from reprimand to discharge, may be necessary. Generally, the corrective action should reflect the severity of the conduct. *See Waltham v. International Paper Co.* 875 F.2d at 479 (appropriateness of remedial action will depend on the severity and persistence of the harassment and the effectiveness of any initial remedial steps). *Dornhecker v. Malibu Grand Prix Corp.*, 828 F.2d 307, 309-10, 44 EPD ¶ 37,557 (5th Cir. 1987) (the employer's remedy may be "assessed proportionately to the seriousness of the offense"). The employer should make follow-up inquiries to ensure the harassment has not resumed and the victim has not suffered retaliation.

Recent court decisions illustrate appropriate and inappropriate responses by employers. In *Barrett v. Omaha National Bank*, 726 F.2d 424, 33 EPD ¶ 34,132 (8th Cir. 1984), the victim informed her employer that her co-worker had talked to her about sexual activities and touched her in an offensive manner. Within four days of receiving this information, the employer investigated the charges, reprimanded the guilty employee, placed him on probation, and warned him that further misconduct would result in discharge. A second co-worker who had witnessed the harassment was also reprimanded for not intervening on the victim's behalf or reporting the conduct. The court ruled that the employer's response constituted immediate and appropriate corrective action, and on this basis found the employer not liable.

In contrast, in *Yates v. Avco Corp.*, 819 F.2d 620, 43 EPD ¶ 37,086 (6th Cir. 1987), the court found the employer's policy against sexual harassment failed to function effectively. The victim's first-level supervisor had responsibility for reporting and correcting harassment at the company, yet he was the harasser. The employer told the victims not to go to the EEOC. While giving the accused harasser administrative leave pending investigation, the employer made the plaintiffs take sick leave, which was never credited back to them and was recorded in their personnel files as excessive absenteeism without indicating they were absent because of sexual harassment. Similarly, in *Zabkowicz v. West Bend Co.*, 589 F. Supp. 780, 35 EPD ¶ 34,766 (E.D. Wis. 1984), co-workers harassed the plaintiff over a period of nearly four years in a manner the court described as "malevolent" and "outrageous." Despite the plaintiff's numerous complaints, her supervisor took no remedial action other than to hold occasional meetings at which he reminded employees of the company's policy against offensive conduct. The supervisor never conducted an investigation or disciplined any employees until the plaintiff filed an EEOC charge, at which time one of the offending co-workers was discharged and three others were suspended. The court held the employer liable because it failed to take immediate and appropriate corrective action.[39]

When an employer asserts it has taken remedial action, the Commission will investigate to determine whether the action was appropriate and, more important, effective. The EEOC investigator should, of course, conduct an independent investigation of the harassment claim, and the Commis-

sion will reach its own conclusion as to whether the law has been violated. If the Commission finds that the harassment has been eliminated, all victims made whole, and preventive measures instituted, the Commission normally will administratively close the charge because of the employer's prompt remedial action.[40]

3/19/90
Date

Approved: _____
R. Gaull Silberman
Vice Chairman

END NOTES

1. *See, e.g., Miller v. Bank of America,* 600 F.2d 211, 20 EPD ¶ 30,086 (9th Cir. 1979)(plaintiff discharged when she refused to cooperate with her supervisor's sexual advances); *Barnes v. Costle,* 561 F.2d 983, 14 EPD ¶ 7755 (D.C. Cir. 1977) (plaintiff's job abolished after she refused to submit to her supervisor's sexual advances); *Williams v. Saxbe,* 413 F. Supp. 665, 11 EPD 10,840 (D.D.C. 1976), *rev'd and remanded on other grounds sub nom. Williams v. Bell,* 587 F.2d 1240, 17 EPD ¶ 8605 (D.C. Cir. 1978), *on remand sub nom. Williams v. Civiletti,* 487 F. Supp. 1387, 23 EPD ¶ 30,916 (D.D.C. 1980) (plaintiff reprimanded and eventually terminated for refusing to submit to her supervisor's sexual demands).

2. *See, e.g., Katz v. Dole,* 709 F.2d 251, 32 EPD ¶ 33,639 (4th Cir. 1983) (plaintiff's workplace pervaded with sexual slur, insult, and innuendo and plaintiff subjected to verbal sexual harassment consisting of extremely vulgar and offensive sexually related epithets); *Henson v. City of Dundee,* 682 F.2d 897, 29 EPD ¶ 32,993 (11th Cir. 1982) (plaintiff's supervisor subjected her to numerous harangues of demeaning sexual inquiries and vulgarities and repeated requests that she have sexual relations with him); *Bundy v. Jackson,* 641 F.2d 934, 24 EPD ¶ 31,439 (D.C. Cir. 1981) (plaintiff subjected to sexual propositions by supervisors, and sexual intimidation was "standard operating procedure" in workplace).

3. To avoid cumbersome use of both masculine and feminine pronouns, this document will refer to harassers as males and victims as females. The Commission recognizes, however, that men may also be victims and women may also be harassers.

4. For a description of the respective roles of the Commission and other federal agencies in investigating complaints of discrimination in the federal sector, *see* 29 C.F.R. § 1613.216.

5. In a subsection entitled "Other related practices," the Guidelines also provide that where an employment opportunity or benefit is granted because of an individual's "submission to the employer's sexual advances or requests for sexual favors, the employer may be liable for unlawful sex discrimination against others who were qualified for but were denied the opportunity or benefit. 29 C.F.R. § 1604.11(g). The law is unsettled as to when a Title VII violation can be established in these circumstances. *See DeCintio v. Westchester County Medical Center,* 807 F.2d 304, 42 EPD ¶ 36,785 (2d Cir. 1986), *cert. denied,* 108 S. Ct. 89, 44 EPD ¶ 37,425 (1987); *King v. Palmer,* 778 F.2d 878, 39 EPD ¶ 35,808 (D.C. Cir. 1985), *decision on remand,* 641 F. Supp. 186, 40 EPD ¶ 36,245 (D.D.C. 1986); *Broderick v. Ruder,* 46 EPD ¶ 37,963 (D.D.C. 1988); *Miller v. Aluminum Co. of America,* 679 F. Supp. 495, 500-01 (W.D. Pa.), *aff'd mem.,* No. 88-3099 (3d Cir. 1988). However, the Commission recently analyzed the issues in its "Policy Guidance on Employer Liability Under Title VII for Sexual Favoritism" dated January 1990.

6. The Court stated that the Guidelines, "`while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *Vinson,* 106 S. Ct. at 2405 (quoting *General Electric Co. v. Gilbert,* 429 U.S. 125, 141-42, 12 EPD ¶ 11,240 (1976), quoting in turn *Skidmore v. Swift & Co.,* 323 U.S. 134 (1944)).

7. For a complaint to be "contemporaneous," it should be made while the harassment is ongoing or shortly after it has ceased. For example, a victim of "hostile environment" harassment who resigns her job because working conditions have become intolerable would be considered to have made a contemporaneous complaint if she notified the employer of the harassment at the time of her departure or shortly thereafter. The employer has a duty to investigate and, if it finds the allegations true, to take remedial action including offering reinstatement (*see infra* Section E).

8. Even when unwelcomeness is not at issue, the investigation should develop this evidence in order to aid in making credibility determinations (*see infra* p. 12).

9. A victim of harassment need not always confront her harasser directly so long as her conduct demonstrates the harasser's behavior is unwelcome. *See, e.g., Lipsett v. University of Puerto Rico,* 864 F.2d 881, 898, 48 EPD ¶ 38,393 (1st Cir. 1988) ("In some instances a woman may have the responsibility for telling the man directly that his comments or conduct is unwelcome. In other instances, however, a woman's consistent failure to respond to suggestive comments or gestures may be sufficient to communicate that the man's conduct is unwelcome"); Commission Decision No. 84-1, CCH EEOC Decisions ¶ 6839 (although charging parties did not confront their supervisor directly about his sexual remarks and gestures for fear of losing their jobs, evidence showing that they demonstrated through comments and actions that his conduct was unwelcome was sufficient to support a finding of harassment).

10. Investigators and triers of fact rely on objective evidence, rather than subjective, uncommunicated feelings. For example, in *Ukarish v. Magnesium Electron,* 33 EPD ¶ 34,087 (D.N.J. 1983), the court rejected the plaintiff's claim that she was sexually harassed by her co-worker's language and gestures; although

she indicated in her personal diary that she did not welcome the banter, she made no objection and indeed appeared to join in "as one of the boys. *Id.* at 32,118. In *Sardigal v. St. Louis National Stockyards Co.*, 41 EPD ¶ 36,613 (S.D. Ill. 1986), the plaintiff's allegation was found not credible because she visited her alleged harasser at the hospital and at his brother's home, and allowed him to come into her home alone at night after the alleged harassment occurred. Similarly, in the *Vinson* case, the district court noted the plaintiff had twice refused transfers to other offices located away from the alleged harasser. (In a particular charge, the significance of a charging party's refusing an offer to transfer will depend upon her reasons for doing so.)

11. *See also Ferguson v. E.I. DuPont deNemours and Co.*, 560 F. Supp. 1172, 33 EPD ¶ 34,131 (D. Del. 1983) ("sexually aggressive conduct and explicit conversation on the part of the plaintiff may bar a cause of action for [hostile environment] sexual harassment"); *Reichman v. Bureau of Affirmative Action*, 536 F. Supp. 1149, 1172, 30 FEP Cases 1644 (M.D. Pa. 1982) (where plaintiff behaved "in a very flirtatious and provocative manner" around the alleged harasser, asked him to have dinner at her house on several occasions despite his repeated refusals, and continued to conduct herself in a similar manner after the alleged harassment, she could not claim the alleged harassment was unwelcome).

12. In Commission Decision No. 84-1, CCH Employment Practices Guide ¶ 6839, the Commission found that active participation in sexual conduct at the workplace, e.g., by "using dirty remarks and telling dirty jokes," may indicate that the sexual advances complained of were not unwelcome. Thus, the Commission found that no harassment occurred with respect to an employee who had joined in the telling of bawdy jokes and the use of vulgar language during her first two months on the job, and failed to provide subsequent notice that the conduct was no longer welcome. By actively participating in the conduct, the charging party had created the impression among her co-workers that she welcomed the sort of sexually oriented banter that she later asserted was objectionable. Simply ceasing to participate was insufficient to show the continuing activity was no longer welcome to her. *See also Loftin-Boggs v. City of Meridian*, 633 F. Supp. 1323, 41 FEP Cases 532 (S.D. Miss. 1986) (plaintiff initially participated in and initiated some of the crude language that was prevalent on the job; if she later found such conduct offensive, she should have conveyed this by her own conduct and her reaction to her co-workers' conduct).

13. However, if the harassing supervisor engages in conduct that is sufficiently pervasive and work-related, it may place the employer on notice that the conduct constitutes harassment.

14. As the court said in *Henson v. City of Dundee*, 682 F.2d at 912 n.25, "In a case of alleged sexual harassment which involves close questions of credibility and subjective interpretation, the existence of corroborative evidence or the lack thereof is likely to be crucial."

15. In *Sardigal v. St. Louis National Stockyards Co.*, 41 EPD ¶ 36,613 at 44,694 (S.D. Ill. 1986), the plaintiff, a waitress, alleged she was harassed over a period of nine months in a restaurant at noontime, when there was a "constant flow of waitresses or customers" around the area where the offenses allegedly took place. Her allegations were not credited by the district court because no individuals came forward with testimony to support her.

    It is important to explore all avenues for obtaining corroborative evidence because courts may reject harassment claims due to lack of corroborative evidence. *See Hall v. F.O. Thacker Co.*, 24 FEP Cases 1499, 1503 (N.D. Ga. 1980) (district judge did not credit plaintiff's testimony about sexual advances because it was "virtually uncorroborated"); *Neidhart v. D.H. Holmes Co.*, 21 FEP Cases 452, 457 (E.D. La. 1979), *aff'd mem.*, 624 F.2d 1097 (5th Cir. 1980) (plaintiff's account of sexual harassment rejected because "there is not a scintilla of credible evidence to corroborate [plaintiff's version].).

16. *See* Commission Decision No. 81-17, CCH EEOC Decisions (1983) ¶ 6757 (violation of Title VII found where charging party alleged that her supervisor made repeated sexual advances toward her; although the supervisor denied the allegations, statements of other employees supported them).

17. Class complaints in the federal sector are governed by the requirements of 29 C.F.R. § 1613 Subpart F.

18. In Commission Decision No. 82-13, CCH EEOC Decisions (1983) ¶ 6832, the Commission stated that a "bare assertion" of sexual harassment "cannot stand without some factual support." To the extent this decision suggests a charging party can never prevail based solely on the credibility of her own testimony, that decision is overruled.

19. *See, e.g., Bundy v. Jackson*, 641 F.2d 934, 953, 24 EPD ¶ 31,439 (D.C. Cir. 1981).

20. In *Highlander* and also in *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 41 EPD ¶ 36,643 (6th Cir. 1986), *cert. denied*, 107 S. Ct. 1983, 42 EPD ¶ 36,984 (1987), the Sixth Circuit required an additional showing that the plaintiff suffered some degree of psychological injury. *Highlander*, 805 F.2d at 650; *Rabidue*, 805 F.2d at 620. However, it is the Commission's position that it is sufficient for the charging party to show that the harassment was unwelcome and that it would have

substantially affected the work environment of a reasonable person.

21. *See, e.g., Scott v. Sears, Roebuck and Co.*, 798 F.2d 210, 214, 41 EPD ¶ 36,439 (7th Cir. 1986) (offensive comments and conduct of co-workers were "too isolated and lacking the repetitive and debilitating effect necessary to maintain a hostile environment claim"); *Moylan v. Maries County*, 792 F.2d 746, 749, 40 EPD ¶ 36,228 (8th Cir. 1986) (single incident or isolated incidents of harassment will not be sufficient to establish a violation; the harassment must be sustained and nontrivial); *Downes v. Federal Aviation Administration*, 775 F.2d 288, 293, 38 EPD ¶ 35,590 (D.C. Cir. 1985) (Title VII does not create a claim of sexual harassment "for each and every crude joke or sexually explicit remark made on the job. . . . [A] *pattern* of offensive conduct must be proved. . . ."); *Sapp v. City of Warner-Robins*, 655 F. Supp. 1043, 43 FEP Cases 486 (M.D. Ga. 1987)(co-worker's single effort to get the plaintiff to go out with him did not create an abusive working environment); *Freedman v. American Standard*, 41 FEP Cases 471 (D.N.J. 1986) (plaintiff did not suffer a hostile environment from the receipt of an obscene message from her coworkers and a sexual solicitation from one co-worker); *Hollis v. Fleetguard, Inc.*, 44 FEP Cases 1527 (M.D. Tenn. 1987) (plaintiff's co-worker's requests, on four occasions over a four month period, that she have a sexual affair with him, followed by his coolness toward her and avoidance of her did not constitute a hostile environment; there was no evidence he coerced, pressured, or abused the plaintiff after she rejected his advances).

22. *See Neville v. Taft Broadcasting Co.*, 42 FEP Cases 1314 (W.D.N.Y. 1987) (one sexual advance, rebuffed by plaintiff, may establish a prima facie case of *quid pro quo* harassment but is not severe enough to create a hostile environment).

23. The principles for establishing employer liability, set forth in Section D below, are to be applied to cases involving physical contact in the same manner that they are applied in other cases.

24. *See also Gilardi v. Schroeder*, 672 F. Supp. 1043, 45 FEP Cases 283 (N.D. Ill. 1986) (plaintiff who was drugged by employer's owner and raped while unconscious, and then was terminated at insistence of owner's wife, was awarded $113,000 in damages for harassment and intentional infliction of emotional distress); Commission Decision No. 83-1, CCH EEOC Decisions (1983) ¶ 6834 (violation found where the harasser forcibly grabbed and kissed charging party while they were alone in a storeroom); Commission Decision No. 84-3, CCH Employment Practices Guide ¶ 6841 (violation found where the harasser slid his hand under the charging party's skirt and squeezed her buttocks).

25. The alleged harasser, a supervisor of another department who did not supervise plaintiff but worked with her regularly, "was an extremely vulgar and crude individual who customarily made obscene comments about women generally, and, on occasion, directed such obscenities to the plaintiff." 805 F.2d at 615. The plaintiff and other female employees were exposed daily to displays of nude or partially clad women in posters in male employees' offices. 805 F.2d at 623-24 (Keith, J., dissenting in part and concurring in part). Although the employees told management they were disturbed and offended, the employer did not reprimand the supervisor.

26. However, while an employee's failure to utilize effective grievance procedures will not shield an employer from liability for *quid pro quo* harassment, such failure may defeat a claim of constructive discharge. *See* discussion of impact of grievance procedures later in this section, and section D(2)(c)(2), below.

27. This well-settled principle is the basis for employer liability for supervisors' discriminatory employment decisions that violate Title VII. 106 S.Ct. at 2408; *see, e.g., Anderson v. Methodist Evangelical Hospital, Inc.*, 464 F.2d 723, 725, 4 EPD ¶ 7901 (6th Cir. 1972) (racially motivated discharge "by a person in authority at a lower level of management" is attributable to employer despite upper management's "exemplary" record in race relations); *Tidwell v. American Oil Co.*, 332 F. Supp. 424, 436, 4 EPD ¶ 7544 (D. Utah 1971) (upper level management's lack of knowledge irrelevant where supervisor illegally discharged employee for refusing to disqualify black applicant discriminatorily); *Flowers v. Crouch-Walker Corp.* 552 F.2d 1277, 1282, 14 EPD ¶ 7510 (7th Cir. 1977) ("The defendant is liable as principal for any violation of Title VII . . . by [a supervisor] in his authorized capacity as supervisor.")

28. The Court observed that the Commission's position was "in some tension" with the first sentence of section 1604.11(c) of the Guidelines but was consistent with the final sentence of that section. (*See supra* at 21).

29. *Barrett v. Omaha National Bank*, 584 F. Supp. 22, 30-31 (D. Neb. 1983), *aff'd*, 726 F.2d 424, 33 EPD ¶ 34,132 (8th Cir. 1984); *Ferguson v. duPont Corp.*, 560 F. Supp. 1172, 1199 (D. Del. 1983); Commission Decision No. 83-1, CCH EEOC Decisions (1983) ¶ 6834. "[A]n employer who has reason to know that one of his employees is being harassed in the workplace by others on grounds of race, sex, religion, or national origin, and does nothing about it, is blameworthy." *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1422, 41 EPD ¶ 36,417 (7th Cir. 1986).

This is the theory under which employers are liable for harassment by co-workers, which was at issue in

Hunter v. Allis-Chalmers. Section 1604.11(d) provides:

> With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

Section E(2) of this paper discusses what constitutes "immediate and appropriate corrective action," and is applicable to cases of harassment by co-workers as well as supervisors.

30. Sexual harassment claims are no different from other types of discrimination claims in this regard. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52, 7 EPD ¶ 9148 (1974).

31. *See I.U.O.E. v. Robbins & Myers, Inc.*, 429 U.S. 229, 236, 12 EPD ¶ 11,256 (1976).

32. The Commission has filed suit in such circumstances, alleging that termination of grievance processing because a charge has been filed constitutes unlawful retaliation in violation of § 704(a). *See EEOC v. Board of Governors of State Colleges & Universities*, 706 F. Supp. 1378, 50 EPD ¶ 39,035 (D. Ill. 1989) (denying EEOC's motion for summary judgement on ground that ADEA's retaliation provision is not violated if termination of grievance proceedings was done in good faith).

33. *See Brooms v. Regal Tube Co.*, 44 FEP Cases 1119 (N.D. Ill. 1987), *aff'd in relevant part*, 881 F.2d 412 (7th Cir. 1989).

34. The fact that an EEOC charge puts the employer on notice of sexual harassment means that the question of imputed employer liability under agency principles often will become of secondary importance. It figured critically in the *Vinson* case because the plaintiff never filed an EEOC charge before filing her Title VII lawsuit. Without having given any prior notice of the sexual harassment to anyone, she waited to file her lawsuit until almost a year after she admitted it had ceased. The sexual harassment was alleged to have taken place mostly in private, and she produced no witnesses either to the alleged harassment or to its adverse effects on her. Her case did not include a constructive discharge claim, and the district court found no *quid pro quo* harassment.

35. *See also Fields v. Horizon House, supra* (an employer might be charged with constructive notice of a supervisor's harassment if the supervisor is vested with unbridled authority to retaliate against an employee).

36. It is important to reemphasize, however, that no matter what the employer's policy, the employer is always liable for any supervisory actions that affect the victim's employment status, such as hiring, firing, promotion or pay. *See supra* at 21-22. Moreover, this discussion of apparent authority recognizes the unique nature of "hostile environment" sexual harassment claims and therefore is limited to such cases.

37. *Cf. Fields v. Horizon House* ("Apparent authority is created by and flows from the acts of the principal, not from the personal beliefs of the third party."). Moreover, as noted above, an employee would find it difficult to establish a constructive discharge in this situation because she could not show she had no alternative but to resign. Failure to complain also might undermine a later assertion that the conduct occurred or was unwelcome.

38. The employer's affirmative duty was first enunciated in cases of harassment based on race or national origin. *See, e.g., United States v. City of Buffalo*, 457 F. Supp. 612, 632-35, 18 EPD ¶ 8899 (W.D.N.Y. 1978), *modified in part*, 633 F.2d 643, 24 EPD ¶ 31,333 (2d Cir. 1980) (employer violated Title VII by failing to issue strong policy directive against racial slurs and harassment of black police officers, to conduct full investigations, and to take appropriate disciplinary action); *EEOC v. Murphy Motor Freight Lines, Inc.*, 488 F. Supp. 381, 385-86, 22 EPD ¶ 30,888 (D. Minn. 1980) (defendant violated Title VII because supervisors knew or should have known of co-workers' harassment of black employees, but took inadequate steps to eliminate it).

39. *See also Delgado v. Lehman*, 665 F. Supp. 460, 44 EPD ¶ 37,517 (E.D. Va. 1987) (employer failed to conduct follow-up inquiry to determine if hostile environment had dissipated); *Salazar v. Church's Fried Chicken, Inc.*, 44 FEP Cases 472 (S.D. Tex. 1987) (employer's policy inadequate because plaintiff, as a part-time teenage employee, could have concluded a complaint would be futile because the alleged harasser was the roommate of her store manager); *Brooms v. Regal Tube Co.*, 44 FEP Cases 1119 (N.D. Ill. 1987) (employer liable when a verbal reprimand proved ineffective and employer took no further action when informed of the harasser's persistence).

40. For appropriate procedures, see §§ 4.4(e) and 15 of Volume I of the Compliance Manual.

This appendix reproduces an EEOC Notice Verbatim.

APPENDIX D

EEOC Notice: Policy Guidance on Employer Liability Under Title VII for Sexual Favoritism

EEOC Notice | Number N-915-048 | January 1990

1. Subject: Policy Guidance on Employer Liability under Title VII for Sexual Favoritism.

2. Purpose: This policy document is intended to provide guidance on the extent to which an employer should be liable for discriminating against individuals who are qualified for but are denied an employment opportunity or benefit, where the individual who is granted the opportunity or benefit received it because that person submitted to sexual advances or requests.

3. Effective Date: On receipt.

4. Expiration Date: As an exception to EEOC Order 205.001, Appendix B, Attachment 4, a(5), this Notice will remain in effect until rescinded or superseded.

5. Originator: Title VII/EPA Division, Office of Legal Counsel.

6. Instructions: File after page 615-10, in Section 615 Volume II of the Compliance Manual (*Harassment*).

7. Subject Matter:

Background

The Commission and the courts have declared that sexual harassment violates Section 703 of Title VII. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64, 40 EPD ¶ 31,159 (1986); EEOC's Guidelines on Discrimination Because of Sex, 29 C.F.R.§ 1604.11(a). EEOC's Guidelines define two kinds of sexual harassment: *quid pro quo*, in which "submission to or rejection of [unwelcome sexual] conduct by an individual is used as the basis for employment decisions affecting such individual," and "hostile environment", in which unwelcome sexual conduct "unreasonably interfer[es] with an individual's job performance" or creates an "intimidating, hostile or offensive working environment." 29 C.F.R. §§ 1604.11(a)(2) and (3).

Subsection (g) of EEOC's Guidelines provides:

> where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but were denied that employment opportunity or benefit.

As discussed below, sexual favoritism in the workplace which adversely affects the employment opportunities of third parties may take the form of implicit *quid pro quo* harassment and/or "hostile work environment" harassment.

Discussion

A. Isolated Instances of Favoritism Towards a "Paramour" Not Prohibited

Not all types of sexual favoritism violate Title VII.[1] It is the Commission's position that Title VII does not prohibit isolated instances of preferential treatment based upon consensual romantic relationships. An isolated instance of favoritism toward a "paramour" (or a spouse, or a friend) may be unfair, but it does not discriminate against women or men in violation of Title VII, since both are disadvantaged for reasons other than their genders.[2] A female charging party who is denied an employment benefit because of sexual favoritism would not have been treated more favorably had she been a man nor, conversely, was she treated less favorably because she was a woman. *See Miller v. Aluminum Co. of America*, 679 F. Supp. 495, 47 EPD ¶ 38,112 (W.D. Pa.), *aff'd mem.*, 856 F.2d 184 (3d Cir. 1988);[3] *DeCintio v. Westchester County Medical Center*, 807 F.2d 304, 42 EPD ¶ 36,785 (2d Cir. 1986), *cert. denied*, 108 S.Ct. 89, 44 EPD ¶ 37,425 (1987).[4] *But see King v. Palmer*, 778 F.2d 878, 39 EPD ¶ 35,808, *reh'g denied*, 39 EPD ¶ 36,036 (D.C. Cir. 1985).[5]

B. Favoritism Based Upon Coerced Sexual Conduct May Constitute *Quid Pro Quo* Harassment

If a female employee[6] is coerced into submitting to unwelcome sexual advances in return for a job benefit, other female employees who were qualified for but were denied the benefit may be able to establish that sex was generally made a condition for receiving the benefit.[7] Thus, in order for a woman to have obtained the job benefit at issue, it would have been necessary to grant sexual favors, a condition that would not have been imposed on men. This is substantially the same as a traditional sexual harassment charge alleging that sexual favors were implicitly demanded as a *quid pro quo* in return for job benefits.[8] For example, in *Toscano v. Nimmo*,

570 F. Supp. 1197, 1199-1201, 32 EPD ¶ 33,848 (D. Del. 1983), the court found a violation of Title VII based on the fact that the granting of sexual favors was a condition for promotion. Although the individual who was granted preferential treatment was engaged in a consensual affair with her supervisor, there was evidence that the supervisor made telephone calls to proposition several female employees at home, phoned employees at work to describe his supposed sexual encounters with female employees under his supervision, and engaged in sexual behavior at work.[9]

Many times, a third party female will not be able to establish that sex was generally made a condition for the benefit in question. For example, a supervisor may have been interested in only one woman and, thus, have coerced only her. Nevertheless, in such a case, both women and men who were qualified for but were denied the benefit would have standing to challenge the favoritism on the basis that they were injured as a result of the discrimination leveled against the woman who was coerced. *See* EEOC *amicus* brief (filed Sept. 30, 1988) in *Clayton v. White Hall School District,* 875 F.2d 676, 50 EPD ¶ 39,048 (8th Cir. 1989), in which the Commission argued that a white employee had standing under Title VII to challenge her employer's decision to deny her an employment benefit pursuant to an employment policy which it allegedly enforced for the purpose of denying the same benefit to a black employee; although the plaintiff was not the object of racial discrimination, she was injured as a result of the race discrimination practice against the black employee.[10] *See also DeCintio v. Westchester County Medical Center,* 807 F.2d at 307-08 (by implication) (male plaintiffs' claims of favoritism rejected not because of lack of standing but because the woman who received the favorable treatment was not coerced into submitting to sexual advances); *EEOC v. T.I.M.E.-D.C. Freight, Inc.,* 659 F.2d 690 n.2, 27 EPD ¶ 32,202 (5th Cir. 1981) (white plaintiffs could challenge discrimination against blacks provided that they could establish a personal injury); *Allen v. American Home Foods, Inc.,* 644 F. Supp. 1553, 42 EPD ¶ 36,911 (N.D. Ind. 1986) (males who lost their jobs due to their employer's discrimination against female coworkers suffered an injury as a result of the discrimination, and therefore, had standing to sue under Title VII).

C. Widespread Favoritism May Constitute Hostile Environment Harassment

If favoritism based upon the granting of sexual favors is widespread in a workplace, both male and female colleagues who do not welcome this conduct can establish a hostile work environment in violation of Title VII regardless of whether any objectionable conduct is directed at them and regardless of whether those who were granted favorable treatment willingly bestowed the sexual favors. In these circumstances, a message is implicitly conveyed that the managers view women as "sexual playthings," thereby creating an atmosphere that is demeaning to women. Both men and women who find this offensive can establish a violation if the conduct is "sufficiently severe or pervasive to alter the conditions of [their] employment and create an abusive working environment.'" *Vinson,* 477 U.S. at 67, [quoting *Henson v. City of Dundee,* 682 F.2d 897, 904, 29 EPD ¶ 32,993 (11th Cir. 1982)).[11] An analogy can be made to a situation in which supervisors in an office regularly make racial, ethnic or sexual jokes. Even if the targets of the humor "play along" and in no way display that they object, co-workers of any race, national origin or sex can claim that this conduct, which communicates a bias against protected class members, creates a hostile work environment for them. *See Rogers v. EEOC,* 454 F.2d 234, 4 EPD ¶ 7597 (5th Cir. 1971), *cert. denied,* 406 U.S. 957, 4 EPD ¶ 7838 (1972) (discriminatory treatment of medical patients created hostile work environment for plaintiff employee); Commission Decision No. 71-969, CCH EEOC Decisions (1973) ¶ 6193 (supervisor's habitual use of racial epithet in referring to Black employees created discriminatory work environment for White Charging Party); Compliance Manual Volume II, Section 615.3(a)(3) Examples (1) and (2) (sexual harassment of females may create hostile work environment for other male and female employees).

Managers who engage in widespread sexual favoritism may also communicate a message that the way for women to get ahead in the workplace is by engaging in sexual conduct or that sexual solicitations are a prerequisite to their fair treatment.[12] This can form the basis of an implicit *quid pro quo* harassment claim for female employees, as well as a hostile environment claim for both women and men who find this offensive.[13]

The case of *Broderick v. Ruder,* 685 F. Supp. 1269, 46 EPD ¶ 37,963 (D.D.C. 1988) illustrates how widespread sexual favoritism can be found to violate Title VII. In *Broderick* a staff attorney at the Securities and Exchange Commission alleged that two of her supervisors had engaged in sexual relationships with two secretaries who received promotions, cash awards, and other job benefits. Another of her supervisors allegedly promoted the career of a staff attorney with whom he socialized extensively and to whom he was noticeably attracted. In addition, there were isolated instances of sexual harassment directed at the plaintiff herself, including an incident in which her supervisor became drunk at an office party, untied the plaintiff's sweater, and kissed her. The court found that the conduct of these supervisors "created an atmosphere of hostile work environment" offensive to the plaintiff and several other witnesses. It further stated that the supervisors' conduct in bestowing preferential treatment upon those who submitted to their sexual advances undermined the plaintiff's motivation and work performance and deprived her and other female employees of promotions and job opportunities. *Broderick,* 685 F. Supp. at 1278. While the court in *Broderick* grounded its ruling on the hostile environment theory, it is the Commission's position that these facts could also support an implicit *quid pro quo* harassment claim since the managers, by their conduct, communicated a message to all female employees in the office that job benefits would be awarded to those who participated in sexual conduct. *See also Spencer v. General Electric,* 697 F. Supp. 204 (E.D. Va. 1988).[14]

> Example 1 - Charging Party (CP) alleges that she lost a promotion for which she was qualified because the co-worker who obtained the promotion was engaged in a sexual relationship with their supervisor. EEOC's investigation discloses

that the relationship at issue was consensual and that the supervisor had never subjected CP's co-worker or any other employees to unwelcome sexual advances. The Commission would find no violation of Title VII in these circumstances, because men and women were equally disadvantaged by the supervisor's conduct for reasons other than their genders. Even if CP is genuinely offended by the supervisor's conduct, she has no Title VII claim.

Example 2 - Same as above, except the relationship at issue was *not* consensual. Instead, CP's supervisor regularly harassed the co-worker in front of other employees, demanded sexual favors as a condition for her promotion, and then audibly boasted about his "conquest." In these circumstances, CP may be able to establish a violation of Title VII by showing that in order to have obtained the promotion, it would have been necessary to grant sexual favors. In addition, she and other qualified men and women who were denied the promotion would have standing to challenge the favoritism on the basis that they were injured as a result of the discrimination levelled against their co-worker.

Example 3 - Same as Example 1, except CP's supervisor and other management personnel regularly solicited sexual favors from subordinate employees and offered job opportunities to those who complied. Some of those employees willingly consented to the sexual requests and in turn received promotions and awards. Others consented because they recognized that their opportunities for advancement would otherwise be limited. CP, who did not welcome this conduct, was not approached for sexual favors. However, she and other female and male co-workers may be able to establish that the conduct created a hostile work environment. She can also claim that by their conduct, the managers communicated to all female employees that they can obtain job benefits only by acquiescing in sexual conduct.

Date: 1/12/90

Approved: Clarence Thomas, Chairman

END NOTES

1. The material in § 615 of the Compliance Manual on subsection (g) of the Guidelines (at pp. 615-10 and 11) is superseded by this Policy Guidance.

2. *See Benzies v. Illinois Dept. of Mental Health*, 810 F.2d 146, 148, 39 EPD ¶ 35,870 (7th Cir.), *cert. denied*, 107 S.Ct. 3231 (1987) (denial of promotion to woman is not violation if motivated by personal or political favoritism or a grudge); *Bellissimo v. Westinghouse Electric Corp.*, 764 F.2d 175, 180, 37 EPD ¶ 35,315 (3d Cir. 1985), *cert. denied*, 475 U.S. 1035, 39 EPD ¶ 35,875 (1986) (discharge of female employee violates Title VII only if it is done on a basis that would not result in the discharge of a male employee).

3. The plaintiff in *Miller* alleged that her supervisor treated her less favorably than her co-worker because the supervisor knew that the co-worker was engaged in a romantic relationship with the plant manager. *Miller*, 679 F. Supp. at 500-01. The lower court held that in order to establish a Title VII claim, the plaintiff would have to show that her employer would have or did treat males differently. *Id.* at 501. Since the plaintiff's male co-workers shared with her the same disadvantage relative to the co-worker who was engaged in the affair with the manager, the plaintiff could not show that she was treated differently than males. *Id.* On appeal to the Third Circuit, the Commission filed an amicus brief supporting the ruling of the district court on the basis that favoritism toward a female employee because of a consensual romantic relationship with a male supervisor is not sex discrimination against other female employees within the meaning of Title VII. The Court of Appeals summarily affirmed.

4. In *DeCintio*, seven male respiratory therapists claimed that they were unlawfully disqualified for a promotion that went to a woman who was engaged in a romantic relationship with the department administrator. The court held that the department administrator's conduct, though unfair, did not violate Title VII. *DeCintio*, 807 F.2d at 308. The court reasoned that the prohibition of sex discrimination in Title VII refers to discrimination on the basis of one's sex, not on the basis of one's sexual affiliations; the therapists' claims were not cognizable under the Act since they were denied promotion because the administrator preferred his "paramour," rather than because of their status as males. *Id.* The court distinguished EEOC's Guidelines by stating that they address the granting of employment benefits because of an individual's "submission" to sexual advances or requests, and the word "submission" connotes a lack of consent. Since the department administrator did not force anyone to submit to sexual advances in order to win promotion, his conduct was not within the purview of the Guidelines. *Id.* at 307-08. *Accord, Handley v. Phillips*, 715 F. Supp. 657, 675, (M.D. Pa. 1989).

5. In *King*, the plaintiff claimed she had been denied a promotion that went to a less qualified co-worker who was engaged in an intimate relationship with the selecting official. Although the issue of whether Title VII applied to preferential treatment was not raised on appeal, the court stated that it agreed with the lower court's conclusion that the case was within the purview of Title VII. *King*, 778 F.2d at 880. The court ruled in favor of the plaintiff on the basis of its finding that her co-worker was promoted because of the sexual relationship. *Id.* at 882. In a concurring opinion to the decision denying a suggestion for rehearing *en banc*, it was emphasized that the issue of whether Title VII applied to the facts of the case was not raised on appeal or in the petition for rehearing. 39 EPD ¶ 36,036.

6. Although this Policy Guidance uses female pronouns to refer to individuals who are treated favorably because they engage in sexual conduct, it also covers situations in which men are granted favorable treatment based on sexual conduct.

7. The employer would also be liable for *quid pro quo* harassment with regard to the individual who was coerced into submitting to the advances.

8. *See* Section 1604.11(1) of EEOC's Guidelines on Sexual Harassment, which states that a violation will be found when submission to unwelcome sexual conduct is made "either explicitly or implicitly" a term or condition of an individual's employment.

9. *See also DeCintio v. Westchester County Medical Center*, 807 F.2d at 307, in which the court stated that the claim in *Toscano* was premised on the coercive nature of the employer's acts, and therefore that the case lent no support to the contention that a voluntary amorous involvement may form the basis of a Title VII claim.

10. In *Clayton*, the court ruled that the plaintiff did have standing, but it based that standing on her allegation of a hostile work environment. 875 F.2d at 679.

11. *See* EEOC's Policy Guidance on Current Issues of Sexual Harassment (10/25/88) at 13-18 for standards governing the determination of whether a work environment is "hostile". That Policy Guidance makes clear that the Commission will evaluate the totality of circumstances on a case-by-case basis, employing the objective perspective of a "reasonable person" in the context in which the challenged conduct took

place. Some factors that could be considered in determining whether a hostile environment is established are the number of incidents of favoritism, the egregiousness of the incidents, and whether or not other employees in the office were made aware of the conduct.

12. *See, e.g., Priest v. Rotary*, 634 F.Supp. 571, 39 EPD ¶ 35,897 (N.D. Cal. 1986), in which the defendant gave preferential treatment to his consensual sexual partner and to those female employees who reacted favorably to his sexual advances and other conduct of a sexual nature, and he disadvantaged those employees, including the plaintiff, who reacted unfavorably to his conduct. The court found a violation of Title VII in part because the defendant's conduct implied that job benefits would be conditioned of an employee's good-natured endurance of his sexually-charged conduct or sexual advances. *Id.* at 581.

13. In *Miller v. Aluminum Co. of America*, 679 F. Supp. at 501-502, the court rejected a claim that sexual favoritism based on a consensual relationship can create a hostile environment for others in the workplace. The court found that the favoritism itself did not violate Title VII since it was voluntary, and that "[h]ostile behavior that does not bespeak an unlawful motive cannot support a hostile work environment claim." *Id.* at 502. However, it is the Commission's position that had the sexual favoritism been widespread, the fact that it was exclusively voluntary and consensual would not have defeated a claim that it created a hostile work environment for other people in the workplace. As indicated above at n.11, the question of whether actions complained of are sufficiently widespread or egregious to constitute a hostile environment must be decided case-by-case.

14. In *Spencer*, the supervisor of an office engaged in virtually daily horseplay of a sexual nature with female subordinates. This behavior included sitting on their laps, touching them in an intimate manner, and making lewd comments. The subordinates joined in and generally found the horseplay funny and inoffensive. With the exception of one incident (which may have been time-barred and was not critical to the court's decision), none of the horseplay was directed at the plaintiff. The supervisor additionally engaged in consensual relations with at least two of his subordinates. The court found that the supervisor's conduct would have interfered with the work performance and would have seriously affected the psychological well-being of a reasonable employee, and on that basis it found a violation of Title VII. 697 F. Supp. at 218. Although *Spencer* did not involve sexual favoritism, the case supports the proposition that pervasive sexual conduct can create a hostile work environment for those who find it offensive even if the targets of the conduct welcome it and even if no sexual conduct is directed at the persons bringing the claim.

APPENDIX E

U.S. Department of Education
Sexual Harassment: It's Not Academic. (1984)

> I was discussing my work in a public setting when a professor cut me off and asked if I had freckles all over my body.[1]

SEXUAL HARASSMENT: IT'S NOT ACADEMIC

Sexual harassment of students is a *real* and increasingly visible problem of serious consequence in higher education. A sexual harassment experience can affect all aspects of a student's life: it can threaten a student's emotional well-being, impair academic progress and even inhibit the attainment of career goals.

Most sexual harassment incidents involve a male harasser and a female victim, although there have been several reported cases involving female harassers and male victims as well as same-sex harassment. Other forms of discrimination, such as that based on race, may be combined with an incident of sexual harassment and further compound the severity of its effect and the difficulty of its resolution. Whatever the circumstances, academic institutions must address the problem in order to ensure all students a just and equal learning opportunity.

TITLE IX AND SEXUAL HARASSMENT

Sexual harassment in educational institutions is not simply inappropriate behavior; it is against the law. Sexual harassment of students is a violation of Title IX of the 1972 Education Amendments in that it constitutes differential treatment on the basis of sex. Title IX applies to any educational program or activity which receives Federal funds and protects both employees and students.*

Prepared by:
U.S. Department of Education
Office for Civil Rights
Washington, D.C. 20202

August 1984

*Although sexual harassment against employees is contrary to Title IX, this pamphlet addresses only the issue of sexual harassment as it relates to students.

The law states:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . .

In an August 1981 policy memorandum, the Office for Civil Rights (OCR) of the U.S. Department of Education reaffirmed its jurisdiction over sexual harassment complaints under Title IX and adopted the following working definition:

> Sexual harassment consists of verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employee or agent of a recipient that denies, limits, provides different, or conditions the provision of aid, benefits, services or treatment protected under Title IX.[2]

I see male colleagues and professors chum it up and hear all the talk about making the old boy network operate for women, so I thought nothing of accepting an invitation from a . . . professor to attend a gathering at his house. Other graduate students were present . . . The professor made a fool out of himself pursuing me (it took me awhile [sic] to catch on) and then blurted, "You know I want to sleep with you; I have a great deal of influence. Now, of course I don't want to force you into anything, but I'm sure you're going to be sensible about this." I fled.[3]

QUESTIONS AND ANSWERS ABOUT SEXUAL HARASSMENT OF STUDENTS

Question: What is an institution's legal responsibility to respond to allegations of sexual harassment?

Answer: The responsibility is the same as it would be for any other sex discrimination complaint filed under Title IX. An institution can either utilize its general grievance procedure, required by Section 106.8 of the Title IX regulation, or develop and implement special procedures for handling sexual harassment allegations. Given the especially sensitive nature of this form of sex discrimination, some institutions have opted for the latter course of action and/or have instituted specific training in handling these cases.

He (the teaching assistant) kept saying, don't worry about the grade, you know we'll settle everything out of class.[4]

Question: What can a student who is confronted by sexual harassment do?

Answer: There are many courses of action that a student can take in response to a sexual harassment experience. They include seeking advice informally, requesting third-party intervention, filing a formal complaint. For example, a student can do one or more of the following:

- Tell the harasser (in person or by letter *and* when it is reasonably certain that such action will not jeopardize the student's personal safety, academic status or professional future) that the behavior is neither humorous nor welcome and should cease immediately.

- Seek support from a friend, colleague or counselor.
- Keep a written record, documenting, as precisely as possible, what happened, when it took place, the names of witnesses, if any, the student's response, and any other information that may be helpful later.[5]
- Find out whether other students and/or employees have also been harassed and whether they could offer corroborating testimony.
- Seek advice on how to deal with the situation from a supportive and knowledgeable person.
- Find out what the campus grievance process is and discuss the options with an advisor and/or friend.
- File a complaint with the institution and/or with the Office for Civil Rights.

> **The financial officer made it clear that I could get the money I needed if I slept with him.[6]**

Question: How does the grievance process work?

Answer: There are many types of grievance procedures. Thus, it is difficult to describe the specific steps that would occur if a student decided to take action following a sexual harassment experience.

An exemplary procedure would provide the student with a variety of sources of initial, confidential and informal consultation concerning the incident(s), without committing the individual to the formal act of filing a complaint with its required subsequent investigation and resolution. Following informal consultation, a student could then decide whether to:

- do nothing (rarely recommended);
- take personal action (such as a letter to the harasser);
- request informal third-party mediation; or
- file a grievance which initiates formal investigation and resolution of a complaint.

Title IX mandates that all such complaints be investigated and resolved in a "prompt and equitable" manner. In some procedures, a single individual conducts the investigation; in others, it is accomplished by committee.

Investigating sexual harassment complaints often requires inquiries into interpersonal relations and may also involve professional ethics, behavior and judgment. Awareness of and sensitivity to the potentially negative effect on the lives and careers of both parties involved is of great importance in handling an investigation. While it is impossible to *guarantee* both parties protection against potential embarrassment or reprisal, efforts should be made to do so. Where there is evidence to substantiate a charge of sexual harassment, the institution must take immediate action to stop and prevent further harassment, as well as initiate appropriate remedial measures.

> **They (the professors) should realize that they have a position of authority over you, and that's going to influence the way you think about them.[7]**

Question: How does a student file an OCR complaint?

Answer: The OCR complaint procedure is initiated by a letter to the OCR regional office serving the Department of Education administrative region where the college or university is located. (Regional OCR addresses begin on page 11.) The letter should include the name, address and daytime telephone number of the student, and provide the date(s) of, and sufficient information about, the alleged incident(s) so that OCR can understand the nature of the complaint.

The complaint should be filed within 180 days from the last date of the alleged discrimination, unless the time for filing is extended by the responsible Department official or his designee. As a policy, OCR does not reveal the names or other identifying information about an individual unless it is necessary for the completion of an investigation or for enforcement activities against an institution that violates the law. OCR never reveals to an institution under investigation the identity of the person who filed the complaint, unless the person first gives OCR written consent to do so.

A student is not required by law to utilize the institutional grievance procedure before filing a complaint with OCR. However, in some institutions, filing a complaint with OCR precludes any further use of the institutional grievance procedures. Thus, a student does need to know what, if any, impact this action will have on utilizing or continuing the institutional grievance process.

Question: Why should a student report a sexual harassment experience?

Answer: The impact of sexual harassment on a student's educational progress and/or attainment of future goals can be significant and should not be underestimated. As a result of a sexual harassment experience, a student may, for example:

- receive an undeserved grade in a critical course;
- have to seek a new academic advisor;
- find it necessary to choose a new thesis topic;
- drop out of a chosen field of study;
- transfer to another college or university;
- be unable to obtain customary job referrals and references; and
- experience adverse emotional effects.

Harassing behavior, if ignored or not reported, is likely to continue and become worse rather than "go away." In addition, unless a sexual harassment experience is reported, the institution cannot take remedial action.

> **Playboy centerfolds were used as Anatomy teaching slides . . . In slides, lectures, teaching aids and even our own student note service, we found that nurses were presented as sexy, bitchy or bossy but never as professional health care workers.[9]**

Question: What is the best way for an institution to deal with sexual harassment?

Answer: The Title IX regulation requires institutions to adopt and publish grievance procedures that provide for the prompt and equitable resolution of sex discrimination complaints. To comply with the requirement, an institution must:

- ensure that its Title IX grievance procedure is suitable and adequate for dealing with sexual harassment complaints and that the college or university is responsive to the rights of all parties involved; and
- ensure that the grievance procedure is publicized and accessible to the entire academic community.

In addition to responding to incidents that have already occurred, steps could be taken to prevent sexual harassment. To help prevent sexual harassment, an institution could:

- issue and disseminate an explicit statement which affirms its position that sexual harassment is a violation of institutional policy and will not be tolerated;

- develop and adopt a working definition that identifies conduct that would be considered harassment; and
- develop methods to inform new administrators, faculty and students of the institution's sexual harassment policy and grievance procedures.

In the final analysis, adoption of strong preventive measures is the best way to confront sexual harassment. Additionally, the Supreme Court has affirmed the right of an individual to pursue private legal action under Title IX. In the event of a lawsuit, previously instituted preventive measures may also serve to reduce institutional liability resulting from acts of sexual harassment.

> **The students have to know that if they decide to take some course of action, it's not going to be wasted time . . . If you take the risk to make a complaint, it's going to be listened to . . . taken seriously and we (the institution) are going to follow through on it . . . and be very serious about it.**[9]

CONSIDER THE FOLLOWING QUESTIONS WHEN DEVELOPING OR EVALUATING AN INSTITUTION'S SEXUAL HARASSMENT GRIEVANCE PROCEDURE

- Is the grievance procedure flexible enough to accommodate the wide range of incidents of sexual harassment?
- Is the grievance procedure coordinated with other institutional grievance procedure systems?
- Can a student be accompanied by a friend or advisor throughout the complaint process?
- Does the grievance procedure provide an opportunity for informal consultation and, where appropriate, informal resolution before moving into formal procedures?
- After initial contact in the grievance procedure, does the complainant have:
  - control over whether or not further institutional action will be taken; and
  - an opportunity to participate in decision-making regarding the method for resolving the matter?
- Is the grievance procedure process credible to the constituency it is designed to serve?
- Are persons of authority, credibility and sensitivity involved in the grievance procedure process?
- Does the grievance procedure adhere to the Title IX regulations?
- Does the grievance procedure provide for independent and impartial investigation which produces persuasive findings based on:
  - thorough fact finding;
  - careful review; and
  - opportunity for appeal?
- Is every effort made to protect the confidentiality of the parties?
- Are the rights and reputations of both complainant and recipient protected?
- Is the opportunity for reprisal and retaliation minimized?
- Does the grievance procedure provide prompt and equitable resolution of the complaint?
- Are there time frames in the grievance procedure by which a complaint should be investigated and resolved?
- Is a thorough yet timely remedy possible within the established timetable?
- Does the grievance procedure include appropriate remedy for the complainant and institutional corrective action where there is a finding of sexual harassment?
- Does the grievance procedure include provisions for quality control, tracking, record keeping and data retrieval?

I think we need to get away from the issue of getting caught. We need to get to the issue of how to stop (sexual harassment) from happening.[10]

Footnotes

1. Cited in Women Student's Coalition (WSC), *The Quality of Women's Education at Harvard University: A Survey of Sex Discrimination in the Graduate and Professional Schools Report, Harvard Univ.*, June 1980, p. 10.
2. OCR Policy Memorandum, August 31, 1981, from Antonio J. Califa, Director for Litigation, Enforcement and Policy Service, OCR to Regional Civil Rights Directors.
3. Frank J. Till, *Sexual Harassment: A Report on the Sexual Harassment of Students*, National Advisory Council on Women's Educational Programs, 1980, p. 18.
4. L. Miranda & Associates, Inc. (LM&A), personal interview with female undergraduate student, 1981.
5. Adapted from "Policy Statement on Sexual Harassment," Northeastern Illinois University, 1981, p. 3.
6. LM&A, op. cit., female undergraduate student, 1981.
7. Ibid, male undergraduate student, 1981.
8. P. Franklin, H. Mogling, P. Zatlin-Boring, R. Angress, "Sexual and General Harassment in the Academy: A Guide for Faculty, Students and Administrators", the Modern Language Association of America, 1981, p. 22.
9. LM&A, op. cit., male undergraduate student, 1981.
10. Ibid, professor of political science, 1981.

FOR INFORMATION AND/OR MATERIALS ON SEXUAL HARASSMENT CONTACT:

Region I

Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont

Regional Civil Rights Director
Office for Civil Rights, Region I
U.S. Department of Education
John W. McCormack Post Office and Court House
Room 222 - Post Office Square
Boston, Massachusetts 02109
(617) 223-1154 TTY (617) 223-1111

Region II

New Jersey, New York, Puerto Rico, Virgin Islands

Regional Civil Rights Director
Office for Civil Rights, Region II
U.S. Department of Education
26 Federal Plaza - 33rd Floor
New York, New York 10278
(212) 264-5180 TTY (212) 264-9464

Region III

Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, West Virginia

Regional Civil Rights Director
Office for Civil Rights, Region III
U.S. Department of Education
Gateway Building - 3535 Market Street
Room 6300 - Post Office Box 13716
Philadelphia, Pennsylvania 19101
(215) 596-6787 TTY (215) 596-6794

Region IV

Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee

Regional Civil Rights Director
Office for Civil Rights, Region IV
U. S. Department of Education
101 Marietta Tower - Room 2702
Atlanta, Georgia 30323
(404) 221-2954 TTY (404) 221-3322

Region V

Illinois, Indiana, Minnesota, Michigan, Ohio, Wisconsin

Regional Civil Rights Director
Office for Civil Rights, Region V
U. S. Department of Education
300 South Wacker Drive - 8th Floor
Chicago, Illinois 60606
(312) 886-3456 TTY (312) 353-2540

Region VI

Arkansas, Louisiana, New Mexico, Oklahoma, Texas

Regional Civil Rights Director
Office for Civil Rights, Region VI
U. S. Department of Education
1200 Main Tower - Room 1420
Dallas, Texas 75202
(214) 767-3856 TTY (214) 767-6599

Region VII

Iowa, Kansas, Missouri, Nebraska

Regional Civil Rights Director
Office for Civil Rights, Region VII
U. S.Department of Education
324 East 11th Street - 24th Floor
Kansas City, Missouri 64106
(816) 374-2223 TTY (816) 374-7264

Region VIII

Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming

Regional Civil Rights Director
Office for Civil Rights, Region VIII
U.S. Department of Education
Federal Office Building
1961 Stout Street - Room 342
Denver, Colorado 80294
(303) 844-5695 TTY (303) 844-3417

Region IX

Arizona, California, Hawaii, Nevada, Guam, Trust Territory of the Pacific Islands, American Samoa

Regional Civil Rights Director
Office for Civil Rights, Region IX
U.S. Department of Education
1275 Market Street - 14th Floor
San Francisco, California 94103
(415) 556-9894 TTY (415) 556-1933

Region X

Alaska, Idaho, Oregon, Washington

Regional Civil Rights Director
Office for Civil Rights, Region X
U.S. Department of Education
2901 3rd Avenue - MS/106 - 1st Floor
Seattle, Washington 98121
(206) 442-1636 TTY (206) 442-4542

APPENDIX F

SAMPLE POLICY

FOR _____ SCHOOLS

SEXUAL HARASSMENT

The policy of the Board of Education forbids discrimination against any employee or applicant for employment on the basis of sex. The Board of Education will not tolerate sexual harassment activity by any of its employees. This policy similarly applies to non-employee volunteers who work subject to the control of school authorities.

A. General Prohibitions

1. Unwelcome Conduct of a Sexual Nature

(a) Conduct of a sexual nature may include verbal or physical sexual advances, including subtle pressure for sexual activity; touching, pinching, patting, or brushing against; comments regarding physical or personality characteristics of a sexual nature; and sexually-oriented "kidding," "teasing," double-entendres, and jokes.

(b) Verbal or physical conduct of a sexual nature may constitute sexual harassment when the allegedly harassed employee has indicated, by his or her conduct, that it is unwelcome.

(c) An employee who has initially welcomed such conduct by active participation must give specific notice to the alleged harasser that such conduct is no longer welcome in order for any such subsequent conduct to be deemed unwelcome.

2. Sexual Harassment

For the purposes of this policy, unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment if:

(a) submission to the conduct is made either an explicit or implicit condition of employment;

(b) submission to or rejection of the conduct is used as a basis for an employment decision affecting the harassed employee; or

(c) the conduct substantially interferes with an employee's work performance, or creates an intimidating, hostile, or offensive work environment.

B. Specific Prohibitions

1. Administrators and Supervisors

(a) It is sexual harassment for an administrator or supervisor to use his or her authority to solicit sexual favors or attention from subordinates when the subordinate's failure to submit will result in adverse treatment, or when the subordinate's acquiescence will result in preferential treatment.

(b) Administrators and supervisors who either engage in sexual harassment or tolerate such conduct by other

employees shall be subject to sanctions, as described below.

2. Non-administrative and Non-supervisory Employees

   (a) It is sexual harassment for a non-administrative and non-supervisory employee to subject another such employee to any unwelcome conduct of a sexual nature. Employees who engage in such conduct shall be subject to sanctions as described below.

C. Reporting, Investigation, and Sanctions

1. It is the express policy of the Board of Education to encourage victims of sexual harassment to come forward with such claims. This may be done through the Employee Grievance Resolution Procedure.

   (a) Employees who feel that administrators or supervisors are conditioning promotions, increases in wages, continuation of employment, or other terms or conditions of employment upon sexual favors, are encouraged to report these conditions to the appropriate administrator. If the employee's direct administrator or supervisor is the offending person, the report shall be made to the next higher level of administration or supervision.

   (b) Employees are also urged to report any unwelcome conduct of a sexual nature by supervisors or fellow employees if such conduct interferes with the individual's work performance or creates a hostile or offensive working environment.

   (c) Confidentiality will be maintained and no reprisals or retaliation will be allowed to occur as a result of the good faith reporting of charges of sexual harassment.

2. In determining whether alleged conduct constitutes sexual harassment, the totality of the circumstances, the nature of the conduct, and the context in which the alleged conduct occurred will be investigated. The Superintendent has the responsibility of investigating and resolving complaints of sexual harassment.

3. Any employee found to have engaged in sexual harassment shall be subject to sanctions, including, but not limited to, warning, suspension, or termination subject to applicable procedural requirements.

Source: Simons, Cuddy & Friedman
- Santa Fe, NM

SAMPLE POLICY

SEXUAL HARASSMENT

I. GENERAL STATEMENT OF POLICY

Sexual harassment is a form of sex discrimination which violates Section 703 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, *et seq.*, and Minn. Stat. §§363.01-.14, the Minnesota Human Rights Act.

It is the policy of Independent School District No. ___ to maintain a learning and working environment that is free from sexual harassment. The School District prohibits any form of sexual harassment.

It shall be a violation of this policy for any student or employee of School District No. ___ to harass a student or an employee through conduct or communication of a sexual nature as defined by this policy.

The School District will act to investigate all complaints, either formal or informal, verbal or written, of sexual harassment and to discipline any student or employee who sexually harasses a student or employee of the School District.

II. SEXUAL HARASSMENT DEFINED

A. Sexual harassment consists of unwelcome sexual advances, requests for sexual favors, sexually motivated physical conduct or other verbal or physical conduct or communication of a sexual nature when:

1. Submission to that conduct or communication is made a term or condition, either explicitly or implicitly, of obtaining or retaining employment, or of obtaining an education; or

2. Submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual's employment or education; or

3. That conduct or communication has the purpose or effect of substantially or unreasonably interfering with an individual's employment or education, or creating an intimidating, hostile or offensive employment or education environment.

Any sexual harassment as defined when perpetrated on any student or employee by any student or employee will be treated as sexual harassment under this policy.

B. Sexual harassment may include but is not limited to:

1. verbal harassment or abuse;

2. subtle pressure for sexual activity;

3. inappropriate patting or pinching;

4. intentional brushing against a student's or an employee's body;

5. demanding sexual favors accompanied by implied or overt threats concerning an individual's employment or educational status;

6. demanding sexual favors accompanied by implied or overt promises of preferential treatment with regard to an individual's employment or educational status; or

7. any unwelcome sexually motivated touching.

III. REPORTING PROCEDURES

Any person who believes he or she has been the victim of sexual harassment by a student or an employee of the School District, or any third person with knowledge or belief of conduct which may constitute sexual harassment should report the alleged acts immediately to an appropriate

School District official as designated by this policy. The School District encourages the reporting party or complainant to use the report form available from the principal of each building or available from the School District office.

A. *In Each School Building.* The building principal is the person responsible for receiving oral or written reports of sexual harassment at the building level. Upon receipt of a report, the principal must notify the District Human Rights Officer immediately without screening or investigating the report. A written report will be forwarded simultaneously to the Human Rights Officer. If the report was given verbally, the principal shall reduce it to written form within 24 hours and forward it to the Human Rights Officer. Failure to forward any sexual harassment report or complaint as provided herein will result in disciplinary action. If the complaint involves the building principal, the complaint shall be filed directly with the District Human Rights Officer.

B. *District-Wide.* The School Board hereby designates _____ as the School District Human Rights Officer to receive reports or complaints of sexual harassment from any individual, employee or victim of sexual harassment and also from the building principals as outlined above. If the complaint involves the Human Rights Officer, the complaint shall be filed directly with the Superintendent.[1] The School District shall conspicuously post the name of the Human Rights Officer, including a mailing address and telephone number.

C. Submission of a complaint or report of sexual harassment will not affect the individual's future employment, grades or work assignments.

D. Use of formal reporting forms is not mandatory.

The School District will respect the confidentiality of the complainant and the individual(s) against whom the complaint is filed as much as possible, consistent with the School District's legal obligations and the necessity to investigate allegations of harassment and take disciplinary action when the conduct has occurred.

IV. INVESTIGATION AND RECOMMENDATION

By authority of the School District, the Human Rights Officer, upon receipt of a report or complaint alleging sexual harassment, shall immediately authorize an investigation.[2] This investigation may be conducted by School District officials or by a third party designated by the School District. The investigating party shall provide a written report of the status of the investigation within 10 working days to the Superintendent of Schools and the Human Rights Officer.[3]

In determining whether alleged conduct constitutes sexual harassment, the School District should consider the surrounding circumstances, the nature of the sexual advances, relationships between the parties involved and the context in which the alleged incidents occurred.

The investigation may consist of personal interviews with the complainant, the individual(s) against whom the complaint is filed, and others who may have knowledge of the alleged incident(s) or circumstances giving rise to the complaint. The investigation may also consist of any other methods and documents deemed pertinent by the investigator.

In addition, the School District may take immediate steps, at its discretion, to protect the complainant, students and employees pending completion of an investigation of alleged sexual harassment.

The School District Human Rights Officer shall make a report to the Superintendent upon completion of the investigation.

V. SCHOOL DISTRICT ACTION

A. Upon receipt of a recommendation that the complaint is valid, the School District will take such action as appropriate based on the results of the investigation.

B. The result of the investigation of each complaint filed under these procedures will be reported in writing to the complainant by the School District. The report will document any disciplinary action taken as a result of the complaint.

VI. REPRISAL

The School District will discipline any individual who retaliates against any person who reports alleged sexual harassment or who retaliates against any person who testifies, assists or participates in an investigation, proceeding or hearing relating to a sexual harassment complaint. Retaliation includes, but is not limited to, any form of intimidation, reprisal or harassment.

VII. NON-HARASSMENT

The School District recognizes that not every advance or consent of a sexual nature constitutes harassment. Whether a particular action or incident is a personal, social relationship without a discriminatory employment effect requires a determination based on all the facts and surrounding circumstances. False accusations of sexual harassment can have a serious detrimental effect on innocent parties.

VIII. RIGHT TO ALTERNATIVE COMPLAINT PROCEDURES

These procedures do not deny the right of any individual to pursue other avenues of recourse which may include filing charges with the Minnesota Department of Human Rights, initiating civil action or seeking redress under state criminal statutes and/or federal law.

IX. SEXUAL HARASSMENT AS SEXUAL ABUSE

Under certain circumstances, sexual harassment may constitute sexual abuse under Minn. Stat. §609.341, subd. 10 through 609.345; Minn. Stat. 609.321 through -.324; or Minn. Stat. §617.246. In such situations, School Districts shall comply with Minn. Stat. §626.556, Reporting of Maltreatment of Minors.

X. DISCIPLINE

Any school district action taken pursuant to this policy will be consistent with requirements of applicable collective bargaining agreements, Minnesota statutes and School District policies. The School District will take such disciplinary action it deems necessary and appropriate, including warning, suspension or immediate discharge to end sexual harassment and prevent its recurrence.

END NOTES

1. In some School Districts the Superintendent may be the Human Rights Officer. If so, an alternative individual should be designated by the School Board.
2. Also see Article IX.
3. If the Superintendent is the subject of the complaint, the report shall be submitted to the Human Rights Officer or the alternate individual as designated by the School Board (see footnote #1).

Source: Minnesota School Boards Association

SAMPLE POLICY

INDEPENDENT SCHOOL DISTRICT NO. ____

SEXUAL HARASSMENT REPORT FORM

General Statement of Policy Prohibiting Sexual Harassment

Independent School District No. ____ maintains a firm policy prohibiting all forms of discrimination based on sex. Sexual harassment against students or employees is sex discrimination. All persons are to be treated with respect and dignity. Sexual advances or other forms of personal harassment by any person, male or female, which create an intimidating, hostile or offensive environment will not be tolerated under any circumstances.

Complainant _____
Home Address _____
Work Address _____
Home Phone _____ Work Phone _____

Date of Alleged Incident(s)_____

Name of person you believe sexually harassed you _____
List any witnesses that were present _____
_____

Where did the incident(s) occur? _____

Describe the incident(s) as clearly as possible, including such things as: what force, if any, was used; any verbal statements (i.e., threats, requests, demands, etc.); what, if any, physical contact was involved; what did you do to avoid the situation, etc. (Attach additional pages if necessary.)

_____
_____
_____
_____
_____

This complaint is filed based on my honest belief that _____ has sexually harassed me. I hereby certify that the information I have provided in this complaint is true, correct and complete to the best of my knowledge and belief.

_____ _____
(Complainant Signature) (Date)

Received by _____ _____
(Date)

Source: Minnesota School Boards Association

SAMPLE POLICY

Memorandum on Sexual Harassment:

SEXUAL HARASSMENT CLAIMS IN THE PUBLIC SECTOR

I. STATE AND FEDERAL LEGISLATION

A. Minnesota Legislation

The Minnesota Human Rights Act prohibits discrimination based upon several factors, including sex. The legislature amended the Human Rights Act in 1982 to clarify that sexual harassment was prohibited.

The legislature also added Minn. Stat. §363.01, Subd. 10a which defines sexual harassment. This subdivision reads:

> "Sexual harassment" includes unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature when:
>
> (1) submission to that conduct or communication is made a term or condition, either explicitly or implicitly, of obtaining employment, public accommodations or public services, education or housing;
>
> (2) submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual's employment, public accommodations, or public services, education or housing; or
>
> (3) that conduct or communication has the purpose or effect of substantially interfering with an individual's employment, public accommodations or public services, education or housing, or creating an intimidating, hostile or offensive employment, public accommodations, public services, education or housing environment; and in the case of employment, the employer knows or should know of the existence of the harassment and fails to take timely and appropriate action.

B. Federal Civil Rights Legislation

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.* does not specifically prohibit sexual harassment, but in 1976, there was judicial recognition that Title VII prohibits sexual harassment. In 1980, federal regulations were issued which codified the judicial decisions prohibiting sexual harassment as follows:

> Harassment on the basis of sex is a violation of § 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when 1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, 2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or 3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment. EEOC, 29 CFR 1604.11

C. Federal Title IX of the Education Amendments of 1972

Title IX, 20 U.S.C. §1681 *et seq.* provides, in pertinent part, as follows:

> "no person in the United States shall, on the basis of sex be excluded from participation in, be denied the benefit of, or

be subject to discrimination under any education program or activity receiving federal financial assistance" . . . 20 U.S.C. §1681(a).

Title IX covers employment practices and employees as well as students and educational programs who are the beneficiaries of federal financial assistance. *See No. Haven Board of Education v. Bell,* 456 U.S. 512 (1982). School districts, state university systems, and some private institutions, receiving federal financial assistance, come within the purview of this provision.

Sexual harassment is actionable under Title IX. *Alexander v. Yale University,* 631 F. 2d 178 (2d Cir. 1980). Individuals, either employees or students of educational institutions receiving federal financial assistance, may bring a private cause of action under Title IX. *Cannon v. Univ. of Chicago,* 441 U.S. 677 (1979).

D. Federal Equal Protection Legislation

U.S.C. Section 1983 provides that every person who, under color of (law) subjects or causes to be subjected any . . . person within the jurisdiction [of the United States] to the deprecation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law or suit in equity.

Recent case law has had little difficulty concluding that sexual harassment can violate rights protected by the equal protection clause; that is, intentional discrimination against a woman because of her sex by a person acting under color of law, *see,* for example, *Estate of Scott v. deLeon,* 37 FEP cases 563 (E.D. Mich. 1985). Sexual harassment is actionable under Section 1983 against public sector employers.

II. WHEN IS AN EMPLOYER LIABLE FOR SEXUAL HARASSMENT?

A. When the employer knows or should have known of the offending conduct.

B. When a management member is the harasser.

C. When the employer makes employment decisions based on submission to sexual demands.

D. When the employer does not take *PROMPT* and *APPROPRIATE* action.

E. When the employer retaliates against the harassed.

F. When the workplace environment is:

1) intimidating;
2) hostile; or
3) offensive.

III. COMMON EMPLOYER DEFENSES WHICH FREQUENTLY FAIL

A. The Employer Did Not Know About The Harassment.

Lack of actual or constructive knowledge does not insulate the employer from liability.

B. The Harassed Employee Did Not Report The Harassment Or Did Not Follow Established Procedures.

This defense may fail if: 1) the harassment was reported by another employee; 2) the harassed was afraid to report it; 3) the employer did not have a policy; or 4) the employer did not effectively communicate its policy.

C. The Employer Investigated And Took Action.

This defense may fail if the investigation is not thorough, complete and impartial, or if the action taken against the harasser is too lenient or inappropriate.

D. The Harassed Employee Voluntarily Participated.

Even if the harassed voluntarily participated in sexual conduct, the employer may still be liable. The standard is whether the harasser's actions are WELCOME, not whether the participation by the harassed was VOLUNTARY.

E. It Was Mutual Horseplay.

It is questionable whether mutual horseplay in the workplace constitutes actionable sexual harassment.

F. The Harassed Suffered No Damages.

The employer may be liable even if the harassed's employment status was not adversely affected.

G. The Harassed Employee Quits.

This may not be a defense if the employee quit due to the sexual harassment.

IV. WHO CAN BE SUED

A. Employer

B. Co-worker, Supervisor, Administrator, Client

C. Labor Union

D. Supervisor/Administrator who fails to investigate

E. The Harasser

V. DAMAGES

A. Lost Wages

B. Reinstatement, Promotion, Raises.

C. Compensatory Damages, Including Pain and Suffering

D. Punitive Damages

E. Attorney's Fees

VI. PREVENTIVE MEASURES

The employer is in the best position to prevent sexual harassment according to the United States Supreme Court.

A. Adoption of a Sexual Harassment Policy

B. Strict, Consistent and Prompt Enforcement of the Policy

C. Training of Employees

Source: Minnesota School Boards Association

SAMPLE POLICY

SADDLEBACK COMMUNITY COLLEGE DISTRICT

PERSONNEL POLICY

PROHIBITING DISCRIMINATION AND HARASSMENT

The Saddleback Community College District is committed to providing equal opportunities for all individuals in all programs and activities which it conducts. Therefore, no student or employee enrolled in or employed by the Saddleback Community College District or applicant for enrollment or employment or others who might receive the benefits of college activities shall be excluded from participation, denied benefits, or be subjected to discrimination or harassment in any process, position, program, service or activity on the basis of ethnic group identification, religion, age, sex, color or physical or mental disability (Government Code Sections 11135 - 11139.5 and *Title 5, Calif. Code of Regulations*, Sections 59300-59362).

Source: Saddleback Community College District
California

SAMPLE POLICY

POLICY AND PROCEDURE FOR INVESTIGATION AND RESOLUTION OF ALLEGED DISCRIMINATION

(Gov. Code 11135-11139.5, Stats. 1977, c. 972 Assembly Bill 803); 5 C.A.C. (59320-59340)

Assembly Bill 803 (A.B. 803)

"No person in the State of California shall, on the basis of ethnic group identification, religion, age, sex, color, or physical or mental disability be unlawfully denied the benefits of or be unlawfully subjected to discrimination under any program or activity that is funded directly by the state or receives any financial assistance from the state." (Government Code Section 11135)

Policy Statement and Purpose

A. Discrimination

Saddleback Community College District is committed to the protection of all members of the college community from violation of human rights and discrimination. The Board of Trustees adopted BP 4000.5 on August 24, 1982 to ensure that its programs and activities are available to all person without regard to ethnic group identification, religion, age, sex, color, or physical or mental disability. The policy provides for the investigation of alleged discrimination in its programs or activities. The District will seek to resolve the complaints in an expeditious manner and within ninety (90) days of date of filing.

B. Definition of Discrimination

Discrimination complaint is an allegation by "one who alleges that he or she has personally suffered unlawful discrimination or by one who has learned of such unlawful discrimination in his or her official capacity." (5 C.A.C Section 59323) BP 4000.5 and the procedure that follows is not intended to be confused (or in conflict) with Grievance Procedure relative to labor relations, grade disputes or District-Association contracts.

C. Sexual Harassment

As AB 803 [sic] also possess the authority to address sexual harassment, the Board of Trustees adopts this policy and procedure to likewise ensure that its programs and activities are available to all persons in an environment free from sexual harassment. This policy will also provide for the investigation of alleged sexual harassment in its educational and work environment. This District will seek to resolve sexual harassment charges in an expeditious manner within ninety (90) days of date of filing.

It is the policy of the Saddleback Community College District to provide an educational and work environment free of unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct or communications constituting sexual harassment as defined and otherwise prohibited by State and Federal statutes (reference Appendix F and G).

It shall be a violation of this policy for anyone who is authorized to recommend or take personal or academic actions affecting an employee or student, or who is otherwise authorized to transact business or perform other acts or services on behalf of the Saddleback Community College District to engage in sexual harassment as defined below. Any person who knowingly violates this policy will be subject to disciplinary action up to and including termination.

D. Definition of Sexual Harassment

Sexual harassment occurs when unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature:

1. Are made either explicitly or implicitly a term or condition of an individual's educational status or employment;

2. Are used as a basis for educational or employment decisions affecting such individual; or

3. Have the purpose or effect of unreasonably interfering with an individual's educational or work performance or creating an intimidating, hostile, or offensive educational or working environment. (EEOC, 29 CFR 1604, 1604.11)

For more specific examples, see page 32 in the Affirmative Action Plan.

E. Representation

The employee, student, or applicant shall be entitled to representation of his or her choice at all complaint meetings beyond Step 1. The complainant shall notify the Administrator for Affirmative Action/Equal Opportunity Programs (Administrator for AA/EOP) in writing of the name and title of the representative at least two days prior to the meeting.

F. Effect of Settlement

Any settlement of this discrimination or sexual harassment complaint policy and procedure shall be applicable to this complaint procedure only, and shall not be binding authority for the disposition of any other matter. Resolution to complaints at any step in the procedure must be signed by the complainant, Administrator for AA/EOP and Chancellor to be considered resolved.

G. Non-Retaliation Policy

The Saddleback Community College Board of Trustees commits the District to ensure that students, applicants, and employees are not adversely affected for having brought forward a charge of discrimination or sexual harassment, testified, assisted, or participated in any manner in an investigation proceeding or hearing relative to A.B. 803. Violations of this policy by an employee are causes for disciplinary action, up to and including termination.

H. Time Constraints

The number of working days indicated at each step herein should be considered a maximum, and effort must be made to expedite the process. If the District fails to respond to the complaint in a timely manner at any step, the complainant may proceed to the next step. Complainant's failure to appeal in writing the decision rendered at any step in the procedure within the specified time period will constitute acceptance of the decision rendered. Time limits may be extended by mutual written consent or due to unusual circumstances. However, time limit extensions must be approved by the Administrator for AA/EEO, who will ensure compliance with mandated time limits established by A.B. 803.

PROCEDURE FOR FILING ALLEGED CHARGE OF DISCRIMINATION OR SEXUAL HARASSMENT

There shall be a sincere effort on the part of involved parties to settle complaints promptly through the steps listed below. Charges of alleged unlawful discrimination or sexual harassment pursuant to A.B. 803 shall be filed under this policy and procedure as soon as possible. However, under no circumstances will a charge be accepted that was not filed within 120 days of the alleged unlawful discrimination.

Complaints filed shall be submitted in accordance with the following, after complainant has attempted to resolve complaint with the person(s) occasioning the complaint:

- Alleged charges relative to applicants for employment or from employees shall be directed to the District Administrator for AA/EEO.

- Alleged charges relative to instructional programs shall be directed to the appropriate campus administrator as determined by the campus president.

- Alleged charges relative to student services shall be directed to the appropriate campus administrator as determined by the campus president.

- Alleged charges relative to business services (Administrative Services) shall be directed to the Vice Chancellor/Fiscal Services and Operations.

The three (3) listed administrators in addition to the District Administrator for AA/EEO will have delegated responsibility for the investigation of complaints filed pertaining to their respective areas or supervision.[1] While the Chancellor has overall responsibility for the implementation of A.B. 803, the Administrator for AA/EEO will be the designated A.B. 803 Compliance Officer (5 C.A.C. Section 59324).

Charges of alleged discrimination filed directly with the Chancellor of the California Community Colleges, will be forwarded by the Chancellor to the Administrator for AA/EEO for investigation and resolution in accordance with A.B. 803 Guidelines. (5 C.A.C. Section 59329)

Informal

Step 1 After the complainant has failed to resolve the complaint with the person(s) occasioning the complaint, but within 120 calendar days of alleged unlawful discrimination, the complainant shall verbally submit his/her complaint to the Campus President (Appropriate District Vice Chancellor).* The Campus President (Vice Chancellor) will direct the complainant to the appropriate campus (District) administrator who will facilitate an informal resolution of the issue. The appropriate administrator will give his/her answer to the Campus President (Vice Chancellor) and the employee/student by the end of the fifth working day following the presentation of the complaint, and the giving of such answer will terminate Step 1.

Formal

Step 2 If the complaint is not resolved in Step 1, the appropriate campus (District) administrator will notify the District Director/Employee Relations and Personnel to inform the director of the alleged charges and of the attempt to resolve charges at the campus level. The District Director/ Employee Relations and Personnel or an Affirmative Action designee will contact the complainant to inform that person of their rights and to provide a copy of the procedure for filing alleged charges of discrimination or sexual harassment. The complaint will be put in writing (using the attached form in Appendix A) by the complainant fully stating the facts surrounding the complaint. The indicated form must be filled out completely, signed, dated, and submitted to the Administrator for AA/EEO within five (5) working days after termination of Step 1.

An investigation will be completed by the Administrator for AA/EEO by the end of the fifteenth day from receipt of complaint. During the first five (5) working days of such period, the aforementioned administrator will notify the Chancellor of the California Community Colleges of receipt of a complaint, per 5 C.A.C. Section 59330. Further, the complainant will also be notified during that period that the investigation has begun or that the complaint is defective.[2] (5 C.A.C. Section 59332)

Complainant shall be notified of the proposed resolution to the complaint by the end of the fifteenth working day from receipt of written complaint.

Upon completing the investigation, the District will attempt to resolve the complaint and will take such action as it deems necessary to correct the effects of any unlawful discrimination or sexual harassment and to ensure that no unlawful discrimination or sexual harassment will occur in the District. (5 C.A.C. Section 59336)

Step 3 If the complaint is not settled in Step 2, the complainant may appeal in writing, within five (5) working days to the Chancellor. A meeting between the Chancellor or designee, Administrator for AA/EEO, appropriate administrator, and complainant shall be conducted within ten (10) working days of receipt of the complainant's written appeal. The Chancellor or designee will render a decision by the end of the fifth working day.

Step 4 If no settlement has been obtained at the conclusion of Step 3, the complainant may appeal in writing to the Board of Trustees within five (5) working days. The Board will render a final decision within ten (10) working days, following the Board meeting at which the complaint was received. Final decision will be communicated to the complainant on the prescribed form provided

*For District Employees

by the Chancellor of the California Community Colleges. (5 C.A.C. Section 59338)

Step 5 Upon receipt of the Board's final decision, if the complainant is not satisfied with the resolution, he/she may submit written objections to the resolution to the Chancellor of the California Community Colleges. Such objections must be submitted within thirty (30) calendar days. (5 C.A.C. Section 59338) If the Chancellor finds "probable cause" to support a finding of unlawful discrimination, an Administrative Hearing will be held.

Final Disposition of Charge of Discrimination or Sexual Harassment

Upon sending the notice pursuant to 5 C.A.C. Section 59338 and within ninety (90) days of initiating the investigation required by 5 C.A.C. Section 59334 the District will forward the following to the State Chancellor:

a) The original complaint;

b) Report of the nature and extent of the investigation conducted by the District;

c) Report of any action taken to resolve the complaint;

d) Evidence that the District has complied with the requirements of 5 C.A.C. Section 59338;

e) Such other information as the State Chancellor may require. (5 C.A.C. Section 59340)

END NOTES

1. All charges of alleged discrimination received by appropriate administrator must be reported to the Administrator for AA/EEO immediately.

2. A complaint is considered to be defective when the complaint is inconsistent with the form, manner, and/or time constraints of A.B. 803 guidelines or District Policy.

Source: Saddleback Community College District California

SAMPLE POLICY

EMPLOYEE STANDARDS OF CONDUCT:
SEXUAL HARASSMENT

DEFINITION Sexual harassment is defined as unwelcome sexual advances, requests for sexual favors, or other sexual conduct, either verbal or physical, when:

1. Submission to such advances, requests, or conduct is explicitly or implicitly a term or condition of individual employment; or

2. Submission to or rejection of such advances, requests, or conduct is used as a basis for employment decisions affecting the individual; or

3. The advances, requests, or conduct have the effect of interfering with performance of duties or creating an intimidating, hostile, or otherwise offensive work environment.

PROHIBITED CONDUCTED Employees shall not engage in conduct constituting sexual harassment. The District shall investigate all allegations of sexual harassment and take appropriate action against employees who engage in sexual harassment.

COMPLAINT PROCEDURE An employee who believes he or she has been or is being subjected to sexual harassment shall bring the matter to the attention of the Principal or immediate supervisor, in accordance with the provisions of DGBA(L). Nothing in that policy shall require the employee alleging sexual harassment to present the matter to the person who is the subject of the complaint.

Source: Texas School Boards Association

SAMPLE POLICY

SEXUAL HARASSMENT OF PERSONNEL

The Board of Education is committed to a policy of nondiscrimination within all District programs or activities on the basis of race, religion, sex, age, national origin or handicapping condition. In addition, sexual harassment of employees is specifically prohibited as a form of illegal discrimination.

Two forms of sexual harassment are recognized under this policy:

1. Requiring an employee to submit to unwelcome sexual advances or conduct as an express or implied condition of receipt or maintenance of employment benefit.

2. Subjecting an employee to demeaning sexual stereotypes, innuendo, intimidation or insult such that a pervasively offensive or hostile employment environment is created.

An employee who believes he or she has been the subject of sexual harassment shall report the alleged harassment through the procedures for resolving complaints of discrimination established through the Human Resources Division.

An employee covered by a negotiated agreement shall report such alleged harassment either through the above procedures or pursuant to the appropriate negotiated agreement.

The procedures for resolving complaints of discrimination and the negotiated agreements require the employee to first report the alleged harassment to his or her immediate supervisor. If the employee believes that the immediate supervisor is the source of the harassment, he or she shall report directly to the appropriate Cabinet level administrator. An employee may request the right to make his or her report of sexual harassment to an administrator of the same sex as the employee. Said request is made through the Executive Director of Human Resources Division.

The administrator receiving the complaint will investigate any report of alleged sexual harassment. Following the investigation, the matter will be reviewed by the Division of Human Resources for further action if warranted.

No employee shall be subject to adverse employment action in retaliation from any good faith report of sexual harassment under this policy. To the extent possible, all reports of sexual harassment will be kept confidential.

Adopted: January 26, 1989

LEGAL REF: Civil Rights Act, 1964, as amended in 1972, Title VII,
Equal Employment Opportunity Act of 1972

CROSS REFS: GBM, Staff Complaint and Grievance
GBA, Equal Opportunity Employment

Source: Caplan & Earnest
Boulder, Colorado

SAMPLE POLICY

GENERAL POLICIES

Non-Discrimination and Affirmative Action

Sexual Harassment

1. Sexual harassment in the workplace is unacceptable conduct and will not be tolerated or condoned. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.

2. Sexual harassment will be regarded as a violation of this policy:

   a. when submission to such conduct is made a condition of employment; or

   b. when submission to or rejection of such conduct is used as the basis of employment-related decisions such as promotion, performance evaluation, pay adjustment, discipline, work assignment; or

   c. when such conduct otherwise interferes with work performance.

3. All complaints of sexual harassment will be promptly and thoroughly investigated, and violations of the policy will be treated as serious disciplinary infractions.

4. All complaints of sexual harassment will be confidential; and only those persons necessary for the investigation and resolution of the complaint will be given information about it.

5. The Superintendent of Schools shall promulgate guidelines which implement the provisions of this policy concerning the reporting, investigation and resolution of complaints of sexual harassment.

Source: Shawnee Mission U.S.D. 512
Kansas

Equal Opportunity Employment and Nondiscrimination

The district shall maintain a working environment free from discriminatory insult, intimidation, or harassment due to race, color, religion, sex, age, national origin, or handicapped status.

Any incident of discriminatory insult, intimidation, or harassment in any form should promptly be reported to the immediate supervisor or other level of management for investigation and corrective action.

Any employee who engages in discriminatory insults, intimidation, or harassment shall be reprimanded and counseled to refrain from such conduct. Any employee who continues to engage in such conduct shall receive progressively severe discipline.

Equal Opportunity Employment and Nondiscrimination

The board shall make every attempt to hire its employees on the basis of the ability and needs of the district.

The district shall be an equal opportunity employer and shall not discriminate in its employment practices and policies with respect to compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, age or national origin.

Inquiries regarding compliance with any federal or state program may be directed to (designated employee) at (office address and telephone number) or to the Director of the Office of Civil Rights, Department of Education, Washington, D.C.

Employment Practices Committee

The Employment Practices Committee shall review the matter to attempt to resolve differences. If an agreed resolution is not possible, the committee shall make a recommendation to the executive director, who shall have final authority to resolve the dispute.

In the event that a staff member believes that he has a grievance involving sexual harassment; racial; ethnic; age; sex; or religious discrimination, and that the immediate supervisor is the perpetrator of the protested behavior, the employee may file a grievance directly with the Employment Practices Committee or the Executive Director, at the grievant's option.

Employees will suffer no reprisal as a result of filing a grievance.

Source: Kansas School Boards Association

SAMPLE POLICY
GUIDELINES FOR DEVELOPING A CAMPUS PROGRAM ON SEXUAL HARASSMENT

The following guidelines may be helpful in improving a current sexual harassment policy/program, or designing a new one:

1. Develop a strong policy prohibiting sexual harassment. A formal policy should be in place that defines sexual harassment and includes a statement as to why it is important for your institution to prevent sexual harassment. The policy may be more effective if it is endorsed by the faculty governing body and monitored by a committee of that body.

2. Develop a grievance procedure that encourages the reporting of incidents of sexual harassment, that allows first for informal resolution and then, if the process fails, for formal resolution.

3. Disseminate the policy to all faculty, staff, administrators, and students as well as to those who contract to do business on campus including those agencies, businesses, education groups, etc. that provide students with internships. The policy and supporting materials could be included in the student handbook; course catalog; course timetable; employee handbook; administrative, faculty, and staff handbooks; pamphlets; institutional campus contracts; and could be incorporated into the academic governance code.

4. Develop a method for informing new staff, faculty, students, and administrators about the policy and for including them in all education programs. Orientation programs and other in-house workshops and seminars may serve as appropriate forums.

5. Create and keep current a campus-wide educational program designed to help all members of the campus community to understand, prevent, and combat sexual harassment. Brochures describing what kinds of behavior constitute sexual harassment and what the person who is being harassed should do about it have been used very successfully on a number of campuses.

6. Provide additional training to supervisory personnel, especially deans, department heads, and administrative and student affairs staff, through work shops and seminars. Student and collegiate governance structures may be appropriate outlets for ongoing training and discussion.

7. Appoint a coordinator to handle reports of harassment. The ombudsperson, affirmative action officer, a student affairs staff member, or a combination of people in these positions, could serve in such capacity. This person or persons should be known to students, faculty, staff, and administrators, and be highly respected by the entire campus community.

8. Adopt, publicize, and enforce penalties for violations of the policy.

9. Investigate and resolve complaints promptly.

10. Keep written records, but take precautions to protect the privacy of all parties involved.

11. Take action to resolve claims even if a discrimination charge has been filed with EEOC or a state EEO agency.

12. Publish the results of resolved complaints on a periodic basis, making certain that all information to be used protects the privacy of parties involved.

Source: American Council on Education

SAMPLE POLICY

SEXUAL HARASSMENT

Sexual harassment will not be tolerated in the school district by the board in matters over which it has jurisdiction. Sexual harassment by board members, administrators, certificated and support personnel, students, vendors, and any others having business or other contact with the school district is prohibited. Persons found in violation of this policy will be subject to discipline, including, but not limited to reprimand, probation, demotion, suspension, or termination, or other sanction as determined appropriate by the board.

Sexual harassment shall include, but not be limited to, unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

- submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;
- submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
- such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Employees, who believe they have suffered sexual harassment, shall report such matters to the personnel director, who shall be the complaint officer for sexual harassment complaints. However, claims regarding sexual harassment may also be reported to the superintendent, who shall be the alternate complaint officer for such complaints.

Complaints reported to a complaint officer, shall be handled by the complaint officer in a timely and confidential manner. Information regarding an investigation of sexual harassment shall be confidential, and those individuals who are involved in the investigation shall not discuss information regarding the complaint outside the investigation.

It shall be the responsibility of the complaint officer to promptly investigate claims of sexual harassment and determine their validity using an informal process. Upon receiving a complaint, the complaint officer shall confer with the person making the complaint to obtain an understanding of and a statement of the facts from the person. Once the complaint officer has obtained a statement of the facts from the person filing the complaint, the complaint officer shall attempt to meet with the person charged with sexual harassment to obtain a response to the complaint. The complaint officer may meet with the parties involved in the complaint as the complaint officer determines to be necessary. Upon completion of the investigation, the complaint officer shall make a recommendation to the superintendent.

It shall be the responsibility of the superintendent to determine what further action should be taken on a complaint of sexual harassment after receiving a report from the complaint officer. If termination or expulsion is determined by the superintendent to be necessary, the superintendent shall make a recommendation to the board regarding the termination or expulsion.

It shall be the responsibility of the board members, administrators, certificated and support personnel, students, and any others having business or other contact with the school district to act appropriately under this policy. It shall be the responsibility of the superintendent to inform and educate school district personnel about sexual harassment.

Any requirements stated in the master labor agreement between school district personnel and the board shall be followed regarding sexual harassment for school district personnel who are members of the collective bargaining unit.

Legal Reference: 42 U.S.C. §§ 2000e *et seq.*
29 C.F.R. 1604.11
Iowa Code §§ 601A (1987 & Supp. 1987).
240 Iowa Admin. Code 3.

Cross Reference: Equal Employment Opportunity
General Personnel Conduct and Appearance
General Personnel Complaints

Approved: _____ Revised: _____

Note: If your school district does not have a personnel director, the board may wish to consider using another administrator to serve as the complaint officer. The board may also wish to use its regular complaint procedure for sexual harassment complaints. If you are a school district that bargains collectively, this would be the procedure used for employee complaints that are not grievable under a collective bargaining agreement. If the board chooses to use its regular complaint procedure, a mechanism must be in place which allows employees to circumvent their direct supervisor in making a sexual harassment claim.

The board may wish to appoint a new complaint officer each year. If so the policy should state this, and procedures must be established to inform the employees immediately who is the appointed person.

The board may also have one person be responsible for investigating the complaint, another for determining the validity of the complaint, and someone else to determine the penalty if the complaint is found valid. Keep in mind, however, that the more persons involved in a complaint, the more likely investigations will be prolonged and the level of confidentiality reduced.

Source: Iowa Association of School Boards

SAMPLE POLICY

PERSONNEL SEXUAL HARASSMENT

It shall be the policy of the East Hartford Board of Education that any form of sexual harassment is expressly prohibited. Any employee found to have engaged in sexual harassment will be subject to immediate disciplinary action, up to and including discharge from employment in appropriate cases.

Sexual harassment consists of any unwelcome sexual advance, request for sexual favors, or other verbal or physical conduct of a sexual nature. Also prohibited is discrimination between employees based on their submission to or cooperation in sexual harassment.

This policy is being implemented pursuant to the terms of state and federal law. It applies equally to all personnel.

Any employee who believes he or she has been subjected to sexual harassment should report the incident immediately to his or her immediate supervisor, department head, or the Assistant Superintendent/Personnel Services, either orally or by written complaint. All such incidents shall be investigated promptly. If it is found that sexual harassment has occurred, the East Hartford Board of Education will take immediate and appropriate corrective action.

Source: East Hartford Public Schools
East Hartford, CT

PERSONNEL SEXUAL HARASSMENT

The Assistant Superintendent for Personnel is designated by the Superintendent as the complaint officer and is responsible for coordinating federal regulations concerning sexual harassment.

The following steps should be taken in the matter of handling any complaint about sexual harassment:

Step I Any complaint will be presented in writing or orally to the complaint officer. If complaint is submitted in writing, it should include the specific nature of the harassment and corresponding dates and also include the name, address, and phone number of the complainant. If the complaint officer determines there is ground for investigation, the complaint must be reduced to writing.

Step II The complaint officer shall thoroughly investigate the complaint, notify the person who has been accused of harassment, and permit a response to the allegation and arrange a meeting to discuss the complaint with all concerned parties within 10 working days after receipt of the written complaint, if deemed necessary. The complaint officer will give a written answer to the complaint within 15 working days after the receipt of the written complaint.

Step III If the complainant is not satisfied with the answer, a complaint may be filed with the Board of Education within 10 working days after receipt of the Step II answer. The Board of Education will, within 30 working days, conduct a hearing at which the complainant will be given an opportunity to present the complaint. The Board will give a written answer to the complaint within 10 working days following completion of the hearing.

Source: East Hartford Public Schools
East Hartford, CT

SAMPLE POLICY

KEYSTONE OAKS SCHOOL DISTRICT

SEXUAL HARASSMENT

1. Purpose

It is the policy of the Keystone Oaks School District to maintain a learning and working environment that is free from sexual harassment.

2. Authority

It shall be a violation of this policy for any member of the District staff to harass a student through conduct or communications of a sexual nature as defined below. It shall also be a violation of this policy for students to harass other students through conduct or communications of a sexual nature as defined below.

3. Definitions

Unwelcome sexual advances, requests for sexual favors and other inappropriate oral, written or physical conduct of a sexual nature when made by a member of the school staff to a student or when made by any student to another student constitute sexual harassment when:

a. submission to such conduct is made, either explicitly or implicitly, a term or condition of an individual's education;

b. submission to or rejection of such conduct by an individual is used as the basis for academic decisions affecting that individual; or

c. such conduct has the purpose or effect of substantially interfering with an individual's academic or professional performance or creating an intimidating, hostile or offensive academic environment.

Sexual harassment, as defined above, may include but is not limited to the following:

verbal harassment or abuse;

pressure for sexual activity;

repeated remarks to a person, with sexual or demeaning implications;

unwelcome touching;

suggesting or demanding sexual involvement accompanied by implied or explicit threats concerning one's grades, job, etc.

4. Procedures

Any person who alleges sexual harassment by any staff member or student in the District may use the District's complaint procedure or may complain directly to the building principal, guidance counselor or other individual designated to receive such complaints. Filing of a complaint or otherwise reporting sexual harassment will not reflect upon the individual's status nor will it affect future employment, grades or work assignments.

The right to confidentiality, both of the complainant and of the accused, will be respected consistent with the District's legal obligations, and with the necessity to investigate allegations of misconduct and take corrective action when this conduct has occurred.

A substantiated charge against a staff member in the District shall subject such staff member to disciplinary action, including discharge.

A substantiated charge against a student in the School District shall subject that student to disciplinary action including suspension or expulsion, consistent with the Student Discipline Code.

Source: Keystone Oaks School District

THE NATIONAL SCHOOL BOARDS ASSOCIATION'S COUNCIL OF SCHOOL ATTORNEYS

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The NSBA Council of School Attorneys is the only national network of school law practitioners providing members information and practical assistance on school law trends. More than 2,700 attorneys, representing school districts of all sizes, benefit from Council activities and programs. The Council's unique program:

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Investigating Alleged Wrongdoing by Employees in the School Setting (April 1990) written by Richard E. Bump, Kelly Frels, and Jeffrey J. Horner. Countless state and federal constitutional, statutory and regulatory provisions complicate investigations of alleged employee wrongdoing in schools. This monograph provides practical tips that ensure accused employees are treated fairly while still providing appropriate and efficient remedies to the school employer. 40 pages. ISBN 0–88364–156–9.

School Discipline Polices & Procedures: A Practical Guide (Revised Edition–April 1990) written by Kelly Frels, Jeffrey J. Horner and Merri Schneider–Vogel. This new edition of the Council's 1984 publication explores the most recent litigation involving the administration of school discipline policies and procedures. The publication focuses on: policy development, general procedures, hearing process, appeals, special problems and discipline of handicapped students. 40 pages. ISBN 0–88364–154–2.

Religion, Education and the U.S. Constitution (May 1990) edited by Naomi Gittins. This monograph is a complilation of nine articles written by Council members and focuses on the affect of the establishment and free exercise clauses of the first amendment and the constitutional issues surrounding accommodating employee religous beliefs, wearing of religious garb, curriculum content, school prayer/ moment of silence, holiday observances, equal access, home school and much more. 112 pages. ISBN 0–88364–153–4.

Sexual Harassment in the Schools: Preventing and Defending Against Claims (available Fall 1990) edited by Naomi Gittins. This comprehensive monograph reviews the most current laws affecting sexual harassment of students and employees in the school setting. You'll receive recent EEOC guidelines and regulations, sample policies, as well as practical information to help you develop your own preventive policies. Approx. 40 pages. ISBN 0–88364–157–7.

School Law in Review 1990 Council members receive their first copy free. This annual publication includes the unedited papers presented at the Annual School Law Seminar and covers the following topics: employment discrimination law, special education litigation, public schools and construction failure, liability for personal injuries, insurance issues, recent Supreme Court rulings, investigating alleged employee wrongdoing and Section 89 repeal. 130 pages. ISBN 0–88364–155–0.

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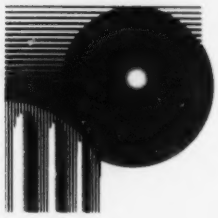

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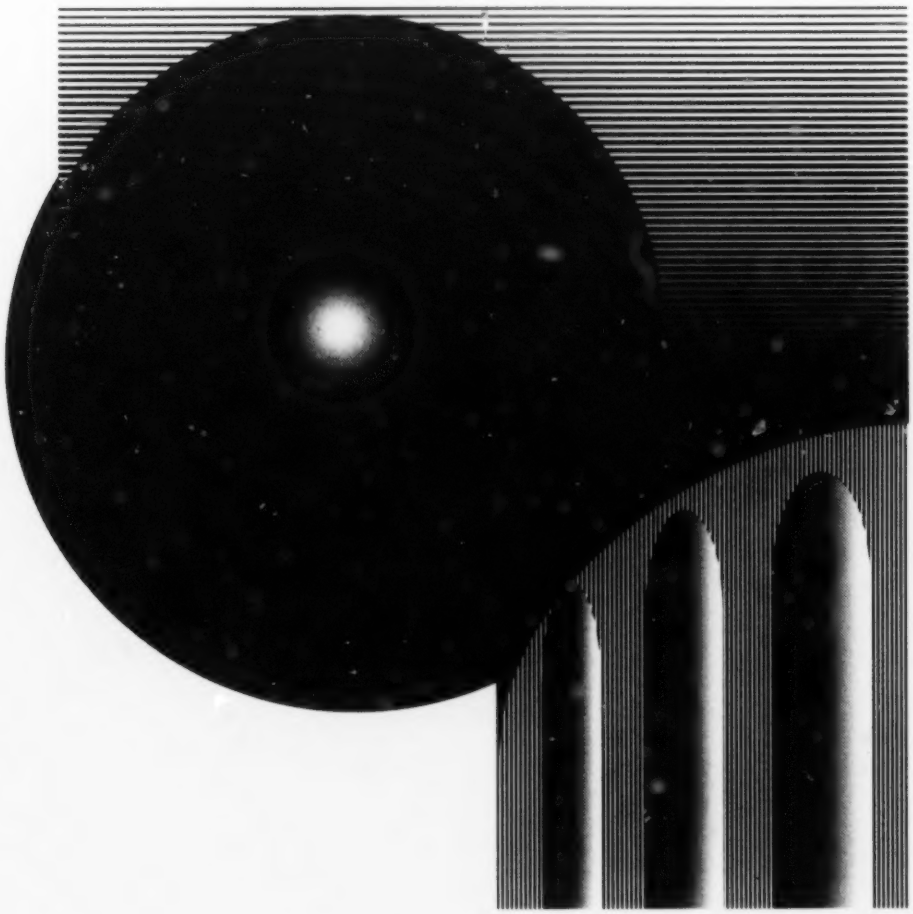

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